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In The

Supreme Court of the United States

October Term, 1994

LLOYD E. SCHLUP, JR.,

Petitioner,

v.

PAUL DELO, Superintendent,
Potosi Correctional Center,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, ILLINOIS, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

On a second (or subsequent) habeas corpus petition, should a petitioner be entitled to federal review of a miscarriage of justice claim concerning the guilt-innocence stage when State post-conviction opportunities to present newly discovered evidence of innocence have not been completed? Should the *Sawyer v. Whitley* standard or the *Kuhlmann v. Wilson* standard govern guilt-innocence stage claims under this "narrow" exception?

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BRIEF OF THE STATES OF CALIFORNIA, ET AL., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI*

Amici are States who have concerns about obtaining finality, the enforcement of their state laws, and the orderly and proper administration of their criminal justice systems. Since the States must bear most of the costs of federal habeas review, *amici* have an interest in minimizing these costs by encouraging the adjudication of guilt or innocence at the state trial, often considered the "main event," or through established state "safety valve" post-conviction mechanisms which permit consideration of newly discovered evidence of innocence once an adequate showing has been made.

This brief is submitted by *amici* through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

STATEMENT OF FACTS AND PROCEEDINGS

On December 11, 1985, petitioner Lloyd E. Schlup was convicted of capital murder and was sentenced to death for his involvement in the stabbing and murder of a fellow inmate at the Missouri State Penitentiary. The Missouri Supreme Court affirmed the conviction and sentence. *State v. Schlup*, 724 S.W.2d 236 (Mo.), *cert. denied*, 482 U.S. 920 (1987).

Petitioner's motion for state post-conviction relief was denied following an evidentiary hearing. The Missouri Supreme Court affirmed the denial of post-conviction relief. *Schlup v. State*, 758 S.W.2d 715 (Mo. 1988). The petitioner then commenced his first federal habeas action, raising several claims based on ineffective assistance of counsel. The federal district court's judgment denying federal habeas relief was affirmed on appeal by the U.S. Court of Appeals for the Eighth Circuit. *Schlup v. Armontrout*, 941 F.2d 631 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 1273 (1992).

Petitioner filed a second petition for writ of habeas corpus, contending that newly discovered evidence suggested he was not present at the scene of the murder. Relief was denied by the federal district court in an unpublished opinion. *See* Joint Appendix, at 68-89. On appeal, a divided panel of the Eighth Circuit affirmed the judgment of the district court. *Schlup v. Delo*, 11 F.3d 738 (8th Cir. 1993). The majority opinion agreed with the district court that petitioner could not meet the "cause and prejudice" exception to permit review on the merits of the second habeas petition. *Id.* at 739. Turning to consideration of petitioner's guilt-innocence stage claim under the "miscarriage of justice" exception, the majority opinion, following Eighth Circuit precedent, applied the *Sawyer v. Whitley* standard, and not the *Kuhlmann v. Wilson* test advocated by petitioner, and denied relief. *Id.* at 740. This Court granted certiorari review. 114 S.Ct. 1368, 128 L.Ed.2d 45 (1994).

SUMMARY OF ARGUMENT

Each State has adopted procedures for the consideration of post-conviction claims of newly discovered evidence in appropriate circumstances. These mechanisms, including a motion for a new trial, collateral or habeas remedies, and clemency, furnish a suitable State "safety valve" for those rare cases where evidence of actual innocence could not be considered during the state trial (often considered the "main event") or on direct review.

This case presents serious federalism questions concerning the ability of States to establish post-conviction remedies for the consideration of newly discovered claims of innocence as part of their criminal justice systems. A federal miscarriage of justice standard should be designed to encourage the use of these state post-conviction avenues in the first instance. *Cf. Herrera v. Collins*, 506 U.S. ___, 113 S.Ct. 853, 869, 122 L.Ed.2d 203 (1993) (assuming *arguendo* federal habeas relief would be warranted "if there were no state avenue open to process" a post-conviction claim of "a truly persuasive demonstration of 'actual innocence' "). The central question is what threshold showing should be required so that the "narrow" miscarriage of justice exception promotes finality; advances comity interests and does not undercut available state post-conviction remedies; does not swallow or undermine the "cause and prejudice" exception or the general habeas rule prohibiting successive, abusive, or defaulted claims; and allows for consideration of those extraordinary constitutional claims involving actual innocence where appropriate.

The miscarriage of justice exception establishes a threshold "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera*, 113 S.Ct. at 862. In *Sawyer v. Whitley*, this Court defined the miscarriage of justice exception to require a petitioner to "show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable State law." 505 U.S. ___, 112 S.Ct. 2514,

2517, 120 L.Ed.2d 269 (1992). Petitioner argues that guilt-innocence stage claims should be governed by the "somewhat lower" *Kuhlmann v. Wilson* standard (requiring "a fair probability that, in light of all the evidence, . . . the trier of fact would have entertained a reasonable doubt of his guilt"), 477 U.S. 436, 454 n.17 (1986) (plurality opinion) (citation omitted), and the *Sawyer* standard should be restricted to sentencing stage claims.

The *Sawyer* standard should apply to both guilt-innocence and sentencing stage claims for at least six reasons: (1) the three miscarriage of justice definitions considered by the *Sawyer* Court embraced claims concerning "innocence of the capital crime itself"; (2) the *Sawyer* standard was actually applied in *Sawyer* to a guilt-innocence stage claim; (3) the *Sawyer* standard is sufficiently high to encourage first resort to comparable state post-conviction remedies and avoids undercutting these state mechanisms or the state criminal justice interests supporting them; (4) application of the *Sawyer* standard avoids disparate results to the interest in finality when both guilt-innocence and sentencing stage claims are raised; this would occur under the "lower burden of proof" under the *Kuhlmann* standard when contrasted with claims considered under the higher "clear and convincing" *Sawyer* standard; (5) lower federal courts have recognized *Sawyer* simply "clarified" the *Kuhlmann* standard and have applied *Sawyer* to guilt-innocence stage claims; and (6) application of the *Sawyer* standard to guilt-innocence and sentencing stage claims promotes certainty and uniformity.

Finally, assuming *arguendo* that the *Sawyer* standard is not applied to guilt-innocence stage claims, *amici* respectfully highlight several attributes for an alternative miscarriage of justice standard.

ARGUMENT

I. Substantial State Interests Are Affected By The Collateral Review Process And "Miscarriage Of Justice" Claims

The State interests implicated in this case can best be assessed by considering the context in which "miscarriage of

justice" claims typically arise and by reviewing the state and federal proceedings which usually precede these claims.[1]

A. The Direct Review Process And The Central Role Of The "Main Event" In Our Criminal Justice System

As a primary matter, the factual question of guilt or innocence is determined at the state trial, often referred to as the "main event."[2] As Justice O'Connor has noted, "Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent." *Herrera*, 113 S.Ct. at 871 (O'Connor, J., concurring); *see also id.* at 859-60 (citing constitutional provisions which protect "against the risk of convicting an innocent person"). Toward this end, the state court holds "the initial responsibility for vindicating

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[1] As a threshold matter, petitioner cannot prevail under the miscarriage of justice exception without establishing a constitutional right violation. *See* note 17, *infra*. The U.S. District Court found petitioner had failed to make such a showing, concluding there was no violation under *Brady v. Maryland*, 373 U.S. 83 (1963). *See* Joint Appendix, at 82-83, 84. The U.S. Court of Appeals for the Eighth Circuit did not expressly address this issue and may have implicitly assumed *arguendo* the existence of a constitutional violation, yet nonetheless denied habeas relief under the miscarriage of justice exception. On at least three occasions, this Court has adopted a similar approach where habeas relief was ultimately denied. *See Smith v. Murray*, 477 U.S. 527, 529, 533 (1986); *id.* at 539-40 (Stevens, J., dissenting); *Engle v. Isaac*, 456 U.S. 107, 122-23 (1982); *Wainwright v. Sykes* 433 U.S. 72, 87 & n.11 (1977).

[2] *Wainwright*, 433 U.S. at 90; *see also Herrera v. Collins*, 113 S.Ct. 853, 869, 122 L.Ed.2d 203 (1993) (noting "in state criminal proceedings the trial is the *paramount event* for determining the guilt or innocence of the defendant") (emphasis added); *Engle*, 456 U.S. at 127 ("A criminal trial concentrates society's resources at one time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence.") (citation and internal quotation marks omitted); *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974) (discussing distinction between criminal trial and appeal).

constitutional rights." *Engle*, 456 U.S. at 128. Among the many applicable constitutional rights, the Sixth Amendment right to effective assistance of counsel serves to ensure a fair and reliable trial.[3] The main event is also the primary forum for the State to exercise its sovereign authority to enforce its criminal laws. *See McCleskey v. Zant*, 499 U.S. 467, 491 (1991); *see also Engle*, 456 U.S. at 128; *Palmore v. United States*, 411 U.S. 389, 402 (1973).

The State criminal justice process provides several opportunities for the question of guilt or innocence to be considered during the "main event" and on direct review. This typically includes:

(a) a motion for entry of judgment of acquittal, at the close of the prosecution's case in chief, *see, e.g.*, Cal. Penal Code § 1118.1;

(b) a motion for entry of judgment of acquittal for insufficient evidence, at the close of all the evidence, *id.*;

(c) the verdict of the jury (or fact finder);

(d) after a verdict, a motion for new trial on the basis of newly discovered evidence, *id.* § 1181(8); and

(e) on direct appeal, often to both an intermediate state court and the state supreme court.

There is a substantial societal interest in trying to resolve all questions of guilt or innocence at the main event or on direct review, given the high concentration of resources by the State and defense during these stages and the recent proximity in time to the facts of the case.

As in the matter at bar, federal miscarriage of justice claims typically arise several years after the conviction

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[3] *See, e.g., Lockhart v. Fretwell*, 506 U.S. ___, 113 S.Ct. 838, 844, 122 L.Ed.2d 180, 191 (1993) (noting prejudice prong of ineffective assistance of counsel claim "focusses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair"); *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (noting adversarial role of counsel "is critical to . . . produce just results" and "to ensure that the trial is fair").

became presumptively valid and final. *See, e.g., Brecht v. Abrahamson*, 507 U.S. ___, 113 S.Ct. 1710, 1719-20, 123 L.Ed.2d 353 (1993) (discussing presumptively final and valid state court conviction and sentence); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) (same). In this case, the presumption of innocence ended more than eight and a half years ago upon the conclusion of a fair trial and jury conviction. *See Herrera*, 113 S.Ct. at 860. The state court conviction and sentence became presumptively final and valid more than seven years ago, when this Court denied certiorari review and the direct review process concluded. *See Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) (discussing conclusion of direct review process).

B. The Ability Of States To Establish State Post-Conviction Avenues To Consider Newly Discovered Claims Of Innocence May Be Jeopardized By The Standard Adopted In This Case

As a matter of state law, all 50 States have recognized the importance of, and have adopted procedures for the consideration of, post-conviction claims of newly discovered evidence in appropriate circumstances. In effect, this furnishes what may be considered as "a kind of [state criminal justice system] 'safety valve' for the 'extraordinary case' " where factual evidence of innocence could not be considered during the "main event." *Harris v. Reed*, 489 U.S. 255, 271 (1989) (O'Connor, J., concurring). These state remedies typically include: (1) a new trial motion; (2) one or more post-conviction (or state habeas) petitions; and (3) clemency. *See* Appendix A (listing current State practices); *see generally Herrera*, 113 S.Ct. at 865-69 & nn.8-11, & 14 (same).

Several criminal justice interests for the State are advanced by these post-conviction avenues. They include the opportunity to protect the integrity of their processes; correct any errors in State proceedings; apply independent State grounds for resolution; entertain, in the first instance, the enforcement of State substantive criminal laws; and provide

an appropriate "safety valve," permitting potentially meritorious claims of innocence to be considered where warranted. In addition to advancing the substantial state interest in finality, these State mechanisms and rules also "channel[] . . . the resolution of [these] types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Reed v. Ross*, 468 U.S. 1, 10 (1984).

Sensitive to these criminal justice concerns, these state post-conviction avenues for relief are available only under appropriate circumstances. For example, as an initial opportunity for post-conviction relief, forty-one States require that a motion for new trial based on newly discovered evidence be filed within a specified time period, which is similar to the federal counterpart.[4] As a matter of state law, many States have modeled their motion for a new trial standard on the

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[4] *See Herrera*, 113 S.Ct. at 865-66; *see also* Appendix A. For nearly fifty years, a two-year limit has applied to motions for a new trial in all federal criminal cases. *See Herrera*, 113 S.Ct. at 865 (discussing history of Fed. R. Crim. P. 33). In at least 15 States, the period for filing a motion for new trial based on newly discovered evidence is longer than for a motion for a new trial based on other grounds, providing an even greater "safety valve" for the consideration of these claims. *See* Appendix A (listing statutes for Alaska, Colorado, Idaho, Iowa, Kansas, Louisiana, Maine, Maryland, Nebraska, Nevada, New Jersey, New Mexico, Ohio, Pennsylvania, and Rhode Island). As the Connecticut Supreme Court recently noted, the jurisdictional time limit to bring a motion for a new trial based on newly discovered evidence "is the product of the legislature's balancing of the interests" at stake and reflects "wise public policy to minimize that degree of unreliability [of stale evidence] by barring the fact-finding process after the applicable limitations period." *Summerville v. Warden*, 229 Conn. 397, 426, 427 (Conn. 1994); *see also Snow v. State*, 105 Nev. 521, 524, 779 P.2d 96 (Nev. 1989) ("[B]ecause the state has the burden of proof in a criminal trial, the prospect of trying a case without access to all of the evidence which was available originally is especially oppressive on the state, and accordingly, the state's interest in maintaining a statute of limitations on the bringing of motions for a new trial is substantial.").

same multi-part test employed in federal criminal cases. *Compare* Appendix A (listing state cases) *with* Appendix B (listing federal cases). Among other things, this standard requires a showing that the newly discovered evidence would "probably result in a different verdict" (or would "probably produce an acquittal"). It also allows a trial court to consider in a timely manner new evidence in light of that which was introduced at trial.

After the deadline for filing a motion for a new trial, in several States a state court may consider other post-conviction relief based on newly discovered evidence at any time. Some of these States allow such post-conviction review only after heightened standards are satisfied. This higher threshold standard, as a matter of state law, respects the State's interest in obtaining finality; encourages the timely filing of motions for new trial; and furnishes an additional "safety valve" which ensures that truly meritorious claims of innocence may be considered at any time.

In California, for example, a defendant may pursue a state habeas claim of newly discovered evidence *at any time*. To obtain post-conviction relief on a claim concerning the guilt-innocence stage of a capital case, the petitioner must point to evidence which "undermine[s] the entire prosecution case and point[s] unerringly to innocence or reduced culpability." *People v. Gonzalez*, 51 Cal.3d 1179, 1246, 800 P.2d 1159 (Cal. 1990), *cert. denied*, 112 S.Ct. 117 (1991); *see also In re Clark*, 5 Cal.4th 750, 766, 855 P.2d 729, 739 (Cal. 1993). Similarly, in Texas, state habeas relief will be granted when the petitioner shows that "based on the newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could find proof of guilt beyond a reasonable doubt." *State of Texas ex rel. Holmes v. Court of Appeals for the Third District*, No. 71,764, slip op. at 17 (Apr. 20, 1994). Other States, including Connecticut, also permit similar state post-conviction relief to be brought at any time after a higher showing for relief has been made. *See* Appendix A. These examples illustrate the unique post-conviction procedures, many long-established, which the

States have developed to furnish state "safety valve" mechanisms which do not disrupt other features of their criminal justice systems.

Finally, clemency may be considered the broadest potential "safety valve" for affording relief in criminal proceedings as it does not usually include the strict evidentiary or threshold standards which apply in state court. *See, e.g.*, Ariz. Rev. Stat. § 31-402 (Arizona Board of Executive Clemency may consider any information before making its recommendation to the Governor). Clemency has been recognized as "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera*, 113 S.Ct. at 866; *see also Whitaker v. State*, 451 S.W.2d 11, 15 (Mo. 1970) (newly discovered evidence of innocence is cognizable in a clemency proceeding). In fact, in this case the Governor previously appointed a commission to review the significance of the newly discovered evidence submitted by the petitioner. *See* Respondent's Brief (Statement of Facts, § E).[5]

The delicate State interests and state post-conviction avenues identified above may be directly affected by the federal habeas miscarriage of justice standard applied in this case. *See, e.g., Sumner v. Mata*, 449 U.S. 539, 547, 550 (1981) (discussing inherent "friction" resulting from overlapping judicial systems). For example, a lenient federal standard may invite belated claims of innocence which would not otherwise be filed, or may even encourage state prisoners to bypass these settled state post-conviction mechanisms.

A permissive federal standard may also require States to litigate claims of newly discovered evidence of innocence *twice*: If a state prisoner does not obtain relief in state court, the same or similar claim will likely be filed in federal court. For example, the *Kuhlmann* "fair probability" standard for

[5] Other unique state post-conviction remedies may also be available. For example, a prosecutor could apply for a post-trial entry of a nolle prosequi if the prosecutor believes the prisoner's actual innocence is established.

federal habeas miscarriage of justice claims, advocated by the petitioner, is strikingly similar to the "probably result in a different verdict" standard used in federal or state motions for new trial. If such a similar standard is adopted for miscarriage of justice claims, *amici* are concerned that in light of existing state post-conviction remedies, a motion for a new trial filed in state court may be converted into a mere " 'tryout on the road' for what will later be the determinative federal habeas hearing." *Wainwright*, 433 U.S. at 90. Not only would such an equivalence in state and federal standards create greater tension resulting from overlapping judicial systems, it would also disregard the significant distinction that a motion for new trial must be filed close in time to the original trial, whereas miscarriage of justice claims, as here, are usually filed several years after the trial. For these reasons, significant federalism concerns are raised in this case concerning the ability of States to design their own criminal justice systems which permit consideration of post-conviction claims of newly discovered evidence of innocence. *See, e.g., Cabana v. Bullock*, 474 U.S. 376, 386-87 (1986) (noting "[t]he State has considerable freedom to structure its capital sentencing system as it sees fit"); *Spaziano v. Florida*, 468 U.S. 447, 464 (1984).[6]

[6] The amicus brief of Five Innocent Former Death Row Inmates and Centurion Ministries cannot stand for the proposition that federal miscarriage of justice claims should be freely available for review in federal court. None of the cases cited in the amicus brief involved federal miscarriage of justice claims. Unlike the matter at bar, the only federal habeas case cited in the brief involved a *first* petition and a *proven independent constitutional violation*. Most significantly, all other cases of innocence referred to in the brief were resolved in state court; federal habeas review was unnecessary in these cases.

C. The "Significant Costs" Of The Federal Habeas Review Process And "The Background Norm Of Procedural Regularity Binding On The Petitioner"

In contrast to the primary role of the "main event" in our criminal justice system, federal habeas review serves a "secondary and limited" function. *Barefoot*, 463 U.S. at 887. Appropriately, the petitioner holds the burden to establish that habeas relief is warranted, since the petitioner is no longer presumed innocent, and the State must now defend against this civil challenge to the presumptively final and valid criminal conviction and sentence. Consistent with this responsibility, this Court's habeas jurisprudence "impl[ies] a background norm of procedural regularity binding on the petitioner." *McCleskey*, 499 U.S. at 490. A state prisoner must fulfill certain obligations before federal habeas review may be invoked, including, as discussed below, the *additional "gateway" or threshold showings* required under both the procedural default and miscarriage of justice doctrines.

As this Court has often recognized, "significant costs" are imposed on our criminal justice system from this secondary and limited collateral review, even during consideration of a first habeas petition.[7] Many of these costs have already been incurred in this case during consideration of the first habeas petition. As an example of the significant costs of collateral review, the enforcement of the presumptively final and valid state court judgment is suspended pending final resolution of the collateral attack. *See In re Blodgett*, 503 U.S. ___, 112 S. Ct. 674, 676, 116 L.Ed.2d 669 (1992) (per curiam); *see also Engle*, 456 U.S. at 126-28. Victims of the crime – and their family members and friends – cannot attain closure until there is finality. *See generally Coleman*, 501

[7] *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 2563, 115 L.Ed.2d 640 (1991) (citation omitted); *McCleskey*, 499 U.S. at 490-91 (also quoted in *Sawyer*, 112 S.Ct. at 2518); *Engle*, 456 U.S. at 126; *see also Murray v. Carrier*, 477 U.S. 478, 487 (1986) (discussing "considerable costs" of habeas review).

U.S. at ___, 111 S.Ct. at 2563 (discussing finality interest); *McCleskey*, 499 U.S. at 491 (same). The deterrence and rehabilitation objectives of state criminal law are undermined by this delay. *See, e.g., Kuhlmann v. Wilson*, 477 U.S. 436, 452-53 & n.14 (1986) (plurality opinion) (deterrence); *Engle*, 456 U.S. at 127 n.32 (deterrence and rehabilitation). Moreover, the costs of retrial to the State and society may be prohibitively high, since the "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible," and may in fact "reward the accused with complete freedom from prosecution." *Engle*, 456 U.S. at 127-28; *see also McCleskey*, 499 U.S. at 491; *Kuhlmann*, 477 U.S. at 453 (plurality opinion). Other important interests, which are often impacted by federal habeas review, include the criminal justice interests in judicial economy and in "channel[ing] the resolution of the claim to the most appropriate forum." *Keeney v. Tamayo-Reyes*, ___ U.S. ___, 112 S.Ct. 1715, 1718, 118 L.Ed.2d 318 (1992).

D. The Cause And Prejudice Exception And The Additional Showing Requirement To Justify Review On The Merits

The significant costs of federal habeas review already identified are multiplied and exacerbated during consideration of a second or subsequent habeas petition. Of course, the longer the delay, the greater is "the potential for prejudice to the State."[8] This Court has often noted that on a second or subsequent habeas petition special "sandbagging" concerns may be implicated, depriving the state courts of an opportunity to consider the claims in the first instance. *See McCleskey*, 499 U.S. at 467-68; *Carrier*, 477 U.S. at 491-92;

[8] *Blodgett*, 112 S.Ct. at 676, 116 L.Ed.2d at 674 (per curiam); *see also McCleskey*, 499 U.S. at 492 ("If reexamination of a conviction in the first round of federal habeas stretches resources, examination of new claims raised in a second or subsequent petition spreads them thinner still.").

Engle, 456 U.S. at 129 n.34; *Reed*, 468 U.S. at 14; *Wainwright*, 433 U.S. at 89-90.

Before the merits of a constitutional violation presented in a habeas claim may be considered on a second or subsequent petition, the "background norm of procedural regularity" requires a petitioner to make an *additional showing* beyond that required on a first petition.[9] A subsequent petition will be considered on the merits only *after* the petitioner establishes *both* "*cause* for the noncompliance" with regular procedures and "*actual prejudice* resulting from the alleged constitutional violation."[10]

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[9] As this Court has recognized, "If federal habeas review of capital sentences is to be at all rational, *petitioner must show something more* in order for a court to reach the merits of his claims on a successive habeas petition then he would have had to show to obtain relief on his first habeas petition." *Sawyer v. Whitley*, 505 U.S. ___, 112 S.Ct. 2514, 2522, 120 L.Ed.2d 269 (1992) (emphasis added); *see also id.* 112 S.Ct. at 2522 n.13. Consistent with the "background norm of procedural regularity," for example, the procedural default and abuse of the writ doctrines:

> impose on petitioners a burden of reasonable compliance with procedures designed to discourage baseless claims and to keep the system open for valid ones; both recognize the law's interest in finality; and both invoke equitable principles to define the court's discretion to excuse pleading and procedural requirements for petitioners who could not comply with them in the exercise of reasonable care and diligence. . . . [These doctrines] are both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments.

McCleskey, 499 U.S. at 493.

[10] *Wainwright*, 433 U.S. at 84 (emphasis added). The "cause and prejudice" standard also applies to procedurally defaulted claims, *id.*; successive petitions, *Kuhlmann*, 477 U.S. at 451 (plurality opinion); claims considered under the abuse of the writ doctrine, *McCleskey*, 499 U.S. at 490-91; and requests to excuse the failure to develop a material fact in state court hearings. *Keeney*, 112 S.Ct. at 1719.

The cause and prejudice bar represents an "accommodation between . . . competing concerns,"[11] and is formulated in light of the criminal justice interest in "the finality of state judgments of conviction, and the significant costs of federal habeas review." *Sawyer*, 112 S.Ct. at 2518 (internal quotation marks and citations omitted); *see also Carrier*, 477 U.S. at 487. The standard is also predicated in substantial part upon the Sixth Amendment "safeguard [of] the right to effective assistance of counsel."[12]

The cause and prejudice requirement appropriately focuses on the petitioner's conduct in presenting the claim at the earliest opportunity. *See, e.g., McCleskey*, 499 U.S. at 486 (noting "both the abuse-of-the-writ doctrine and our procedural default jurisprudence concentrate on a *petitioner's acts* to determine whether he has a *legitimate excuse* for failing to raise a claim at the appropriate time") (emphasis added); *see also id.* at 498. Consequently, the "cause" standard requires a showing of "something *external* to the petitioner, something that cannot fairly be attributed to him[.]" *Coleman*, 111 S.Ct. at 2566 (emphasis in original); *see also Keeney*, 112 S.Ct. at 1721 n.5.

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[11] *Keeney*, 112 S.Ct. at 1718; *see also Coleman*, 111 S.Ct. at 2567 (discussing "allocation of costs" and burden imposed on petitioner under procedural default doctrine); *Reed*, 468 U.S. at 11 (noting "competing concerns . . . embodied in the 'cause and prejudice' requirement").

This standard, based upon 28 U.S.C. § 2244(b), also reflects the fact that since 1966 the federal habeas statute "establishe[d] a 'qualified application of the doctrine of res judicata' " to address the problem of repetitive petitions. *McCleskey*, 499 U.S. at 486 (quoting S. Rep. No. 1797, 89th Cong., 2d Sess., 2 (1966)).

[12] *Carrier*, 477 U.S. at 496 (noting this "safeguard" assists in the formulation of a procedural default standard); *see also Smith*, 477 U.S. at 539 (noting burden of establishing cause and prejudice is not satisfied where, *inter alia*, "the defendant was represented by competent counsel"). In fact, a showing of ineffective assistance of counsel establishes "cause." *See, e.g., Coleman*, 501 U.S. at ___, 111 S.Ct. at 2567; *Carrier*, 477 U.S. at 488.

E. The "Narrow" Exception to the Cause and Prejudice Exception: The Miscarriage of Justice Standard

Even when the cause and prejudice exception is not met, as in the matter at bar, *see Schlup*, 11 F.3d at 739, the miscarriage of justice exception may still allow review on the merits of a constitutional claim. This standard is recognized as a "*narrow* exception to the cause-and-prejudice requirement."[13] Recognizing the necessarily restricted availability of this exception, this Court has consistently rejected proposed definitions for the miscarriage of justice exception which "would turn the case in which an error results in a fundamental miscarriage of justice, the 'extraordinary case,' into an all too ordinary one."[14]

Like the cause and prejudice standard, the miscarriage of justice exception is also founded on the interest in finality. *See Sawyer*, 112 S.Ct. at 2522. This Court has also "emphasized that the miscarriage of justice exception is concerned

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[13] *Keeney*, 112 S.Ct. at 1721 (emphasis added); *Harris*, 489 U.S. at 271 (O'Connor, J., concurring). This Court has repeatedly stressed the "narrow scope" of this exception. *See Sawyer*, 112 S.Ct. at 2519; *id.* at 2520; *McCleskey*, 499 U.S. at 494; *id.* at 502; *Dugger v. Adams*, 489 U.S. 401, 412 n.6 (1989); *Carrier*, 477 U.S. at 496; *Kuhlmann*, 477 U.S. at 454 (plurality opinion).

[14] *Dugger*, 489 U.S. at 412 n.6 (citation omitted); *see also Sawyer*, 112 S.Ct. at 2522 (noting any standard employed cannot "so broaden the inquiry as to make [the standard] anything but a 'narrow' exception to the principle of finality which we have previously described it to be"); *Dugger*, 489 U.S. at 412 n. 6 (rejecting contention that miscarriage of justice is established where (a) "there is a substantial claim that the constitutional violation undermined the accuracy of the sentencing decision" or (b) trial court "found an equal number of aggravating and mitigating circumstances") (citation omitted); *Antone v. Dugger*, 465 U.S. 200, 206 (1984) (per curiam) (noting the miscarriage of justice exception is not "served by reconsideration of those claims previously presented on federal habeas"); *Engle*, 456 U.S. at 135 (rejecting "a plain-error standard").

with actual as compared to legal innocence."[15] The standard also contemplates "an additional safeguard against miscarriages of justice in criminal cases" which "is the right to effective assistance of counsel."[16]

Just as the cause and prejudice standard interposes an additional showing before the merits of the habeas claim may be considered, so too does the miscarriage of justice exception establish a threshold "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera*, 113 S.Ct. at 862. In *Sawyer*, this Court clarified this gateway requirement, holding that "to show 'actual innocence' one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable State law. 112 S.Ct. at 2517. In the death penalty context, this showing may include "innocence of the capital crime itself" or "a showing that there was no aggravating circumstance or that

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[15] *Sawyer*, 112 S. Ct. at 2519 (citation omitted); *see also Kuhlmann*, 477 U.S. at 454 n.17 (plurality opinion) ("[T]he question whether the prisoner can make the requisite showing must be determined by reference to *all* probative evidence of guilt or innocence.") (emphasis in original) (citation omitted); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1979) ("A defendant would not bring himself within [the miscarriage of justice exception] by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained.") [hereinafter *Friendly*].

[16] *Carrier*, 477 U.S. at 496. The fundamental role of the Sixth Amendment concerning issues raised on federal habeas review cannot be overlooked. As already noted, the Sixth Amendment operates not only at the "main event," but also under the cause and prejudice and miscarriage of justice standards. *See* notes 3 & 12, and accompanying text, *supra*. Just as "[t]he presence of such a safeguard may properly inform this Court's judgment in determining what standard should govern the exercise of the habeas court's equitable discretion with respect to procedurally defaulted claims," *Carrier*, 477 U.S. at 496 (internal quotation marks and citation omitted), so too may this constitutional standard guide the Court's definition and application of the miscarriage of justice exception. *See id.*

some other condition of eligibility had not been met." *Id.* at 2522. Once this threshold or "gateway" showing has been made to justify federal habeas review on a second or subsequent petition, habeas relief is still not warranted until a violation of a constitutional right can be established.[17]

F. Summary: This Case Does Not Come Before the Court On A Clean Slate

The federal miscarriage of justice "safety valve" serves an important role in our criminal justice system but should be carefully confined to appropriate cases, consistent with its "narrow" scope. This exception should not be used to disrupt the interest in finality or to undermine or disparage the state criminal justice system, including what should be the "main event," or state post-conviction (or "safety valve") mechanisms for reviewing newly discovered evidence of innocence.[18] As this Court has already observed, "most of the

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[17] *See Herrera*, 113 S.Ct. at 862-63 ("We have never held that [the miscarriage of justice exception] extends to freestanding claims of actual innocence."); *Kuhlmann*, 477 U.S. at 454 (plurality opinion) (noting colorable showing of factual innocence "supplements [the prisoner's] constitutional claim"); *see also McClesky*, 499 U.S. at 495; *Townsend v. Sain*, 372 U.S. 293, 317 (1963); *Moore v. Dempsey*, 261 U.S. 86, 88 (1923).

Moreover, *any* habeas relief may be granted only when a violation of federal rights has been established. *See* 28 U.S.C. § 2254(a); *see also Estelle v. McGuire*, 502 U.S. ___, 112 S.Ct. 475, 116 L.Ed.2d 385, 396 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); *Engle*, 456 U.S. at 119 (same). Further, this Court has repeatedly noted that "federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." *Smith v. Phillips*, 455 U.S. 209, 221 (1982); *see also Chandler v. Florida*, 449 U.S. 560, 570 (1981).

[18] Repetitive or liberal review of state court criminal judgments undermines confidence in the main event, the state court system, and important state criminal justice interests. *See, e.g., Herrera*, 113 S.Ct. at 874 (O'Connor, J., concurring) ("At some point in time, the State's interest in finality must outweigh the prisoner's interest in yet another round of

price paid for federal review of state prisoner claims is paid by the States." *Coleman*, 501 U.S. at ___, 111 S.Ct. at 2559.

In light of the substantial cost of collateral review on a second or subsequent petition, a habeas petitioner, consistent with the background norm of procedural regularity, should sustain a heavy burden to justify review under the miscarriage of justice exception. Otherwise this narrow exception (which already constitutes an exception to the cause and prejudice exception) may be used to swallow the general rule prohibiting review of subsequent petitions.

Significantly, this case does not come before this Court on a clean slate. If this Court could assume *arguendo* federal habeas relief may be warranted in the absence of a showing of an independent constitutional violation where there is "no state avenue open to process . . . a claim" of actual innocence, *Herrera*, 113 S.Ct. at 869, then it follows that the federal miscarriage of justice standard should similarly be sensitive to state post-conviction remedies. This Court has previously noted that "[i]ssuance of a habeas writ . . . exacts an extra charge by undercutting the State's ability to enforce its procedural rules." *Engle*, 456 U.S. at 129. As discussed above, these concerns equally apply to state post-conviction remedies developed to consider newly discovered evidence of innocence.

II. The *Sawyer* Standard Should Be Maintained For Guilt-Innocence Stage Claims

The petitioner argues that the "somewhat lower" *Kuhlmann* standard should govern guilt-innocence stage

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litigation."); *McCleskey*, 499 U.S. at 492 ("Perpetual disrespect for the finality of convictions disparages the entire criminal justice system."); *Engle*, 456 U.S. at 127 ("Liberal allowance of the writ . . . degrades the prominence of the trial itself."); *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in result) ("It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.").

claims. Petitioner's Brief, at 29. For at least six reasons, the *Sawyer* standard should be maintained for guilt-innocence stage claims.

First, the *Sawyer* definition of the miscarriage of justice exception expressly included showings concerning "innocence of the capital crime itself." *Sawyer*, 112 S.Ct. at 2522. In fact, each of the three possible standards considered by the *Sawyer* Court embraced the elements of the offense.[19] The differences among the three standards focused solely on whether, and how, aggravating and mitigating circumstances should be considered. Consequently, the *Sawyer* standard already countenances an inquiry involving guilt-innocence stage claims that "the wrong person of the crime" may have been convicted. *Id.* at 2519.

Second, and concomitantly, this Court applied the *Sawyer* standard to a claim which went to "*both* [the] petitioner's guilt or innocence of the crime of first-degree murder, and the aggravating circumstance of a murder committed in the course of an aggravated arson." *Id.* at 2524 (emphasis added). At least one federal court has already noted this application of

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[19] Of the three definitions considered by the *Sawyer* Court,
(1) "The strictest definition," proposed by the Solicitor General, "would be to limit any showing to *the elements of the crime* which the State has made a capital offense," *Sawyer*, 112 S.Ct. at 2521 (emphasis added);
(2) "The most lenient" standard, submitted by the petitioner, "would be to allow the showing of [a miscarriage of justice] to extend not only to *the elements of the crime*, but also to the existence of aggravating factors, and to mitigating evidence which bore, not on the defendant's eligibility to receive the death penalty, but only on the ultimate discretionary decision between the death penalty and life imprisonment," *id.* (emphasis added);
(3) Finally, a "middle ground" test proposed a focus on the state law elements which made the petitioner eligible for the death penalty, which necessarily included the elements of the crime. *Id.* at 2522-23.

the *Sawyer* standard. *See McCoy v. Lockhart*, 969 F.2d 649, 651 & n.4 (8th Cir. 1992).

Third, the *Sawyer* standard affords appropriate respect for the role of State post-conviction remedies based on newly discovered evidence. In contrast, a lenient or "lower" miscarriage of justice standard may disregard vital state interests advanced by these post-conviction remedies, and may encourage reexamination on federal habeas review of similar issues previously presented during a motion for a new trial in state court. *See* Section I(B), *supra* (comparing standards). For example, as already noted, the *Kuhlmann* "fair probability" standard is lower than California's *Gonzalez* standard for granting post-conviction relief based on newly discovered evidence. These claims are raised at the guilt-innocence stage and may be brought at any time. In contrast, the *Sawyer* standard is substantially similar to the *Gonzalez* test. The "clear and convincing evidence" standard in *Sawyer* ensures, as a threshold matter, that a truly meritorious evidentiary showing is made. In addition, it serves to screen out cumulative evidence or unreliable recantations. In this manner the *Sawyer* standard is similar to the motion for new trial standard employed in most States. *See* Appendix A; *compare also State v. Coogan*, 453 N.W.2d 186, 188 (Wis. Ct. App. 1990) (noting "defendant must establish his right to a new trial by clear and convincing evidence," under Wis. Stat. Ann. § 974.06 (state post-conviction provision)). The *Kuhlmann* standard, as advocated by petitioner, does not contain similar protections.

Fourth, the application of finality and comity concerns that have been repeatedly recognized by this Court should not be contingent on whether the petitioner presents a guilt-innocence or sentencing stage claim. The *Sawyer* standard is predicated upon, and best serves, these important criminal justice interests. *See, e.g., Sawyer*, 112 S.Ct. at 2522. While the petitioner expressly acknowledges that the *Kuhlmann* standard employs a "lower burden of proof" than the *Sawyer* standard, he fails to ensure that the interests in finality and comity, implicated by a second habeas petition, are adequately and similarly protected. *See* Petitioner's Brief, at 29.

Disparate results under the interest in finality would occur if the "clear and convincing" *Sawyer* standard were applied to sentencing stage claims, while a "fair probability" standard governed guilt-innocence claims. On a second or subsequent habeas petition, the state interest in finality and comity is the *same* regardless of whether the claim concerns the guilt-innocence or the sentencing stage.

Fifth, other federal courts have applied the *Sawyer* standard to guilt-innocence stage claims.[20] As lower courts have recognized, the *Sawyer* standard simply "clarified" the *Kuhlmann* standard, which was announced but not applied in a plurality opinion.[21] Until *Sawyer*, this Court did not have

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[20] *See Spencer v. Murray*, 18 F.3d 229, 236 (4th Cir. 1994); *Cornell v. Nix*, 976 F.2d 376, 381 (8th Cir. 1992) (en banc), *cert. denied*, 113 S.Ct. 1820 (1993) (citing *McCoy*, 969 F.2d at 651); *see also Williams v. Whitley*, 994 F.2d 226, 233 n.3 (5th Cir.), *cert. denied*, 114 S.Ct. 608 (1993) (noting "we have no doubts about the Court's opinion in *Sawyer*"). Those lower courts which have suggested the potential application of the *Sawyer* or *Kuhlmann* standard ultimately denied habeas relief, concluded application of either standard did not affect the outcome of the case. *See Epperly v. Booker*, 997 F.2d 1, 10 (4th Cir.), *cert. denied*, 114 S.Ct. 611 (1993); *Williams*, 994 F.2d at 233 n.3 (noting the "petition would be dismissed as successive under *Kuhlmann* as well"); *see also Campbell v. Blodgett* 997 F.2d 512, 524 n.15 (9th Cir. 1992) (noting "Campbell fails to meet our prior, more lenient standard as well," which was overruled in *Sawyer*, 112 S.Ct. at 2521 & n.11), *cert. denied*, 114 S.Ct. 1337 (1994). Other lower courts have noted the two different standards without any substantive discussion and ultimately denied habeas relief. *See Montoya v. Collins*, 988 F.2d 11, 13 (5th Cir.) ("He has not even alleged, much less demonstrated, that a 'miscarriage of justice' regarding actual innocence or 'actual innocence of the death penalty' could be established in his case."), *cert. denied*, 113 S.Ct. 1630 (1993); *Campbell*, 997 F.2d at 524-25 (noting petitioner "has expressly disclaimed any attempt to meet" the miscarriage of justice exception).

[21] *See, e.g., Blair v. Armontrout*, 976 F.2d 1130, 1135 (8th Cir. 1992) (discussing "the *Kuhlmann* actual innocence standard, as clarified by *Sawyer*"), *cert. denied*, 113 S.Ct. 2357 (1993); *Cornell*, 976 F.2d at 381 (noting the U.S. Supreme Court "refined the 'actual innocence' standard" in *Sawyer*).

many opportunities to explain or apply the miscarriage of justice exception. As recently as 1989, "actual innocence of the death penalty" remained undefined. *Dugger*, 489 U.S. at 412 n.6.

Sixth, the application of the *Sawyer* standard to both the guilt-innocence and sentencing stages promotes certainty and uniformity in habeas jurisprudence. *See, e.g., Keeney*, 112 S.Ct. at 1720 (noting objective to "advance[] uniformity in the law of habeas corpus"); *McCleskey*, 499 U.S. at 496 (discussing interests in "certainty and stability"). In other cases, the same substantive standard for the actual innocence exception has been applied in capital and non-capital habeas cases and to guilt-innocence and sentencing stage claims. *See e.g., McCoy*, 969 F.2d at 651-52 (listing cases). Analogously, in *Sawyer*, this Court advanced similar interests in uniformity by adopting one standard for "successive, abusive, or defaulted" federal habeas petitions. *Sawyer*, 112 S.Ct. at 2517. Similarly, this Court has also "reject[ed] the suggestion that the [cause and prejudice] principles . . . apply differently depending on the nature of the penalty a state imposes for the violation of its criminal laws." *Smith*, 477 U.S. at 538, or on the constitutional claim asserted. *Engle*, 456 U.S. at 129.

III. Assuming *Arguendo* The *Sawyer* Standard Is Not Applied, An Alternative Threshold Showing Should Contain Other Attributes And Safeguards To Protect The Narrow Application Of The Miscarriage of Justice Exception

Assuming *arguendo* this Court declines to apply the *Sawyer* standard to guilt-innocence stage claims, several considerations may influence an alternative miscarriage of justice standard, as discussed below:

For several cases before and after *Kuhlmann*, the contours of the miscarriage of justice exception remained undefined. *Compare Engle*, 456 U.S. at 135; *Wainwright*, 433 U.S. at 91, *with Dugger*, 489 U.S. at 412 n. 6; *Smith*, 477 U.S. at 537-38.

A. Pursuit Of State Post-Conviction Remedies Should Be Encouraged

A federal miscarriage of justice standard should encourage pursuit of state post-conviction avenues for presenting claims of newly discovered evidence of innocence. *Cf. Herrera*, 113 S.Ct. at 869 (assuming *arguendo* federal habeas relief would be warranted "if there were no state avenue open to process" a post-conviction claim of "a truly persuasive demonstration of 'actual innocence' "); *id.* at 874 (O'Connor, J., concurring) (suggesting federal habeas review of claims of actual innocence should be "reserved for extraordinarily high and truly persuasive demonstrations of actual innocence *that cannot be presented to state authorities*") (emphasis added; internal quotation marks, brackets and citation omitted). Such a rule would advance several of the state criminal justice interests which have already been noted, *see* Section I(B), *supra*, and, where applicable, would provide state courts with an opportunity to make findings of fact that would be entitled to a presumption of correctness on federal habeas review. *See* 28 U.S.C. § 2254(d).

B. The Threshold Level Should "Necessarily Be Extraordinarily High" To Promote Finality; Avert A "Deluge" Of Frivolous Claims; And Screen Out Manufactured, Untrustworthy, Or Cumulative Claims

This Court has aptly recognized, in a related context, that in light of "the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would *necessarily be extraordinarily high*." *Herrera*, 113 S.Ct. at 869 (emphasis added). This concern for a sufficiently high threshold to screen out unmeritorious claims has been echoed by

others, including Justice O'Connor and Judge Friendly.[22] As already noted, the *Sawyer* "clear and convincing evidence" standard appropriately serves this function as well as the interest in finality.

The miscarriage of justice standard, as a threshold "gateway," should also protect against consideration of perjured evidence or uncorroborated, recanted testimony, or manufactured claims of innocence. Such evidence has regrettably become all too common and is frequently submitted during the eleventh hour of litigation.[23] As Justice O'Connor has

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[22] *See Herrera*, 113 S.Ct. at 874 (O'Connor, J., concurring) (Unless federal habeas review is "reserved for extraordinarily high and truly persuasive demonstrations of actual innocence that cannot be presented to state authorities, the federal courts will be *deluged with frivolous claims of actual innocence*.") (emphasis added; internal quotation marks, brackets and citation omitted); *Friendly, supra*, at 150 (The "requirement . . . would enable courts of first instance to screen out rather rapidly a great multitude of applications not deserving their attention and devote their time to those few where injustice may have been done, and would effect an even greater reduction in the burden on appellate courts."); *see also State v. Williams*, 96 Wash.2d 215, 634 P.2d 868, 874 (Wash. 1981) ("[E]ach new trial inevitably leaves new avenues for investigating the facts anew. Hardly a case can be supposed but what, by diligent search, some additional evidence will be found that would, if offered at trial, have been admissible on one theory or another. The mere existence of such evidence does not alone justify the granting of a new trial.").

[23] As this Court has noted in the miscarriage of justice context, where necessary, "efforts on the part of habeas petitioners to delay their filings until the last minute with a view to obtaining a stay because the district court will lack time to give them the necessary consideration before the scheduled execution" will be considered against the petitioner in his or her request for relief. *Sawyer*, 112 S.Ct. at 2520 n.7; *see also Herrera*, 113 S.Ct. at 869 (noting "likelihood of abuse is as great – or greater – here" under miscarriage of justice claims compared to new trial motions); *Gomez v. United States District Court for the Northern District of California*, 503 U.S. ___, 112 S.Ct. 1652, 118 L.Ed.2d 293 (1992) (per curiam); *McCleskey*, 499 U.S. at 490 ("In habeas, equity recognizes that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.") (internal quotation marks and citation omitted).

observed, last-minute affidavits in capital cases concerning newly discovered evidence of innocence should generally "be treated with a fair degree of skepticism." *Herrera*, 113 S.Ct. at 872 (O'Connor, J., concurring). Addressing this problem, many States have built-in similar protections for considering post-conviction relief based upon newly discovered evidence of innocence. For example, some States have established special procedures concerning the consideration of recanted evidence.[24] The *Sawyer* "clear and convincing evidence" standard indirectly screens out similar evidence of questionable reliability.

C. Presumption of Correctness

For at least two reasons, the federal miscarriage of justice standard should include a presumption of correctness which must be overcome. *First*, the State, having marshalled its resources to introduced evidence at trial at a time close to the crime in question, is entitled to such a presumption, which already attaches on the first habeas petition. *See, e.g., Barefoot*, 463 U.S. at 887; *see also Herrera*, 113 S.Ct. at 883 (Blackmun, J., dissenting) (Because the convicted prisoner is no longer entitled to a presumption of innocence, "it is fair to place on him the burden of proving his innocence, not just raising doubt about his guilt."). *Second*, even the *Jackson* sufficiency of the evidence standard requires that the evidence "be considered in the light most favorable to the prosecution." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). If the

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[24] *See, e.g., State v. Perry*, 232 Mont. 455, 758 P.2d 268, 275 (Mont. 1988) ("recanted testimony is to be viewed with great suspicion" and the trial judge should grant a new trial only if "satisfied the recantation of the witness is true") (citation omitted); *State v. Britt*, 320 N.C. 705, 360 S.E.2d 660, 665 (N.C. 1987) (adopting and discussing modified recantation rule under *Larrison v. United States*, 24 F.2d 82, 87-88 (7th Cir. 1928)); *Blankenship v. State*, 447 A.2d 428, 434 (Del. 1982) (special standard for granting new trial based on recanted evidence); *People v. Barbara*, 400 Mich. 352, 255 N.W.2d 171, 174 (Mich. 1977) (recantation testimony "traditionally regarded as suspect and untrustworthy").

State was entitled to such a presumption in a *Jackson* claim, it certainly deserves this presumption on a second or subsequent habeas petition involving a miscarriage of justice claim.

D. Scope of Evidence: Any Newly Discovered Evidence of "Actual" Innocence Should Be Considered Against The Evidence Presented At Trial

The scope of evidence considered for a guilt-innocence stage claim should include all evidence which bears on the question of guilt or innocence. Both the *Kuhlmann* and *Sawyer* standards focus on *actual*, not *legal*, innocence. *See* note 15, *supra*. Similarly, in *Herrera*, each member of the Court agreed that any claim of *newly discovered* evidence of actual innocence should be considered in light of the evidence presented at trial.[25] State post-conviction remedies take a similar approach. *See, e.g., State of Texas ex rel. Holmes*, No. 71,764, slip op. at 17 (Apr. 20, 1994) (for post-conviction relief, petitioner must show that "based on the newly discovered evidence and *the entire record before the jury that convicted him*, no rational trier of fact could find proof of guilt beyond a reasonable doubt") (emphasis added). Any other standard would allow "hot" newly discovered evidence to prevail over "cold" evidence which was originally presented to the jury.

E. Respect For The Fundamental Role Of The Jury Through A Juror-Based Perspective

The jury (or fact finder) is the primary decision maker entrusted in our criminal justice system with determining questions of innocence or guilt. *See generally* note 2, *supra*,

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[25] *See Herrera*, 113 S.Ct. at 870 (noting "the affidavits must be considered in light of the proof of petitioner's guilt at trial"); *id.* at 872-73 (O'Connor, J., concurring); *id.* at 875 (Scalia, J., concurring and "join[ing] the entirety of the Court's opinion"); *id.* (White, J., concurring in the judgment); *id.* at 883 (Blackmun, J., dissenting). As Justice Blackmun noted in dissent, "the stronger the evidence of the prisoner's guilt, the more persuasive the newly discovered evidence of innocence must be." *id.* (Blackmun, J., dissenting).

and accompanying text. Not surprisingly related standards adopted by this and other Courts have respected the central role of the jury in our criminal justice system. For example, the *Sawyer* miscarriage of justice standard provides "but for a constitutional error, *no reasonable juror* would have found the petitioner eligible for the death penalty under the applicable state law."[26] Such a juror-based point of view respects the primary role of the fact finder at the "main event" in our criminal justice system and "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."[27] Moreover, the jury originally considered the evidence when it was "fresh," before it could become "stale" or unavailable. Analogously, the *Jackson* sufficiency of the evidence standard focuses on whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

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[26] *Sawyer*, 112 S.Ct. at 2517 (emphasis added). The observations of the Washington Supreme Court in the state court context certainly apply to the limited and secondary role of a federal habeas court:

> The granting of a new trial by the trial judge involves the relationship and function of three entities: (1) the trial judge, (2) the jury, and (3) the appellate courts. A fine balance must be struck so that any one entity does not unduly usurp the functions of either of the other two, while still giving each sufficient latitude to fulfill its own legitimate function. . . . [State case law has recognized that] it is an abuse of discretion for a trial court to grant a new trial simply because the judge does not agree with the verdict. . . . [A standard should be rejected which would] virtually inject the trial judge as a thirteenth juror permitting that judicial officer to independently determine credibility and weigh evidence.

Williams, 634 P.2d at 873, 875 (citations and footnote omitted).

[27] *Jackson*, 443 U.S. at 319; *see generally Wright v. West*, 505 U.S. ___, 112 S.Ct. 2482, 2492, 120 L.Ed.2d 225 (1992) (plurality opinion) ("In *Jackson*, we emphasized repeatedly the deference owed to the trier of fact and, correspondingly, the sharply limited nature of constitutional sufficiency review.").

Jackson, 443 U.S. at 319. (emphasis in original). Any other point of view concerning the question of guilt or innocence risks "imping[ing] upon 'jury' discretion." *Id.* In other contexts, this Court has wisely rejected a point of view inquiry based upon the subjective determination of a federal judge.[28] Without a similar jury-based focus, the consideration of newly discovered evidence may be inappropriately disconnected from what actually transpired at the "main event."

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[28] *See Jackson*, 443 U.S. at 318-19 (The *Jackson* sufficiency of the evidence "inquiry does not require a court to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.") (emphasis in original; internal quotation marks and citation omitted); *id.* at 320 n.13 (The *Jackson* standard "does not permit a [federal] court to make its own subjective determination of guilt or innocence.").

While the *Jackson* analogy is useful to consider, it is important to highlight some distinctions. A *Jackson* inquiry focuses on a constitutional due process violation; the miscarriage of justice standard merely furnishes a "gateway" threshold which must be satisfied before the merits of the constitutional claim may be considered. A sufficiency of the evidence *Jackson* determination may also bar retrial under the Double Jeopardy Clause; relief under the miscarriage of justice exception may actually permit retrial, where, years after the original state trial, evidence remains available. *See Hudson v. Louisiana*, 450 U.S. 40 (1981). Finally, a *Jackson* review concentrates on the sufficiency of the evidence which was actually admitted; a miscarriage of justice claim involves newly discovered evidence which was not introduced in the original trial (which puts it in a similar posture to those state post-conviction remedies allowing consideration of newly discovered evidence of innocence). *See also Herrera*, 113 S.Ct. at 861 (distinguishing *Jackson*).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision of the court below be affirmed.

Dated: July 11, 1994

Respectfully submitted,

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APPENDIX A

STATE POST-CONVICTION REMEDIES FOR CONSIDERING NEWLY DISCOVERED EVIDENCE OF INNOCENCE[1]

ALABAMA

MOTION FOR NEW TRIAL

ALA. CODE § 15-17-5 (1982) (30 day limit); ALA. R. CRIM. P. 24.1 (same); *Young v. State*, 346 So.2d 509, 514 (Ala. Crim. App. 1977) (motion for new trial based on newly discovered evidence requires defendant to show (1) evidence will "probably change the result if a new trial is granted"; (2) evidence discovered since trial; (3) due diligence; (4) material; and (5) not merely cumulative or impeaching)

POST-CONVICTION REMEDIES

ALA. R. CRIM. P. 32.1(e) (post-conviction relief based on newly discovered material facts which require that the conviction or sentence be vacated); *id.* 32.2(c) (petitions filed under Rule 32.1(e) must be filed under applicable 2 year period or within 6 months of discovery of new material facts, whichever is later)

PROCEDURES FOR COMMUTATION, PARDONS OR CLEMENCY

ALA. CONST. art. V, § 124; ALA. CONST. amend. 38; ALA. CODE § 15-18-100 (1982)

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[1] The citations contained in this Appendix have been submitted to each State for verification. Grateful acknowledgement is made to the States furnishing information and materials for this Appendix. Appendix prepared by Jennifer P. Anderson, California Attorney General's Office.

ALASKA

MOTION FOR NEW TRIAL

ALASKA R. CRIM. P. 33 (1983) (2 year limit when motion is based on newly discovered evidence, but if an appeal is pending, motion may be granted only on remand; 5 day limit for all other grounds); *Salinas v. State*, 373 P.2d 512, 514 (Alaska 1962) (standard for granting new trial based on newly discovered evidence: (1) evidence discovered since trial; (2) due diligence; (3) not merely cumulative; (4) material; and (5) "would probably produce an acquittal upon new trial")

POST-CONVICTION REMEDIES

ALASKA R. CRIM. P. 35.1(a)(4) (evidence of material facts exists that was not previously presented and heard, which requires vacation of the conviction or sentence in the interest of justice); *id.* 35.1(c) (no time limit); *Hensel v. State*, 604 P.2d 222, 231 (Alaska 1979) ("defendant has the burden of proving by a preponderance of the evidence that newly discovered evidence would be likely to change the result of the trial – that is, that the evidence is sufficient to create a reasonable doubt as to his guilt"); *id.* at 235 n.55 (noting state's burden in post-conviction proceedings "should, if anything, be less" than in motion for new trial)

CLEMENCY, ETC.

ALASKA CONST. art. III, § 21; ALASKA STAT. §§ 33.20.070 (executive clemency grant of authority), 33.20.080(a) (authorizing Governor to refer applications for clemency to the parole board for investigation and report)

ARIZONA

MOTION FOR NEW TRIAL

ARIZ. R. CRIM. P. 24.1 (10 day jurisdictional limit); *State v. Madsen*, 125 Ariz. 346, 609 P.2d 1046, 1055-54 (motion to vacate judgment based on newly discovered evidence may be brought under ARIZ. R. CRIM. P. 24.2, Rule 32.1(e) standards apply), *cert. denied*, 449 U.S. 873 (1980); *State v. Fisher*, 141 Ariz. 227, 250-51, 686 P.2d 750, 773-74 (standard for granting motion for new trial based on newly discovered evidence under ARIZ. R. CRIM. P. 24.2 or 32.1(e): (1) discovery since trial; (2) due diligence; (3) not merely cumulative or impeaching; (4) material; and (5) would probably change the verdict), *cert. denied*, 469 U.S. 1066 (1984)

POST-CONVICTION REMEDIES

ARIZ. R. CRIM. P. 32.1(e) (post-conviction relief when "newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence"; relief contingent on (1) discovery after trial; (2) due diligence; and (3) evidence cannot be cumulative or

"used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence"); *see also State v. Fisher*, 141 Ariz. 227, 250-251, 686 P.2d 750, 773-774 (standard for granting motion for new trial based on newly discovered evidence under ARIZ. R. CRIM. P. 24.2 or 32.1(e): (1) discovery since trial; (2) due diligence; (3) not merely cumulative or impeaching; (4) material; and (5) would probably change the verdict), *cert. denied*, 469 U.S. 1066 (1984); ARIZ. R. CRIM. P. 32.2(b) (no time limit)

CLEMENCY, ETC.

ARIZ. CONST. art. V, § 5; ARIZ. REV. STAT. ANN. §§ 31-402, 31-443, 31-445 (1986 and Supp. 1992)

ARKANSAS

MOTION FOR NEW TRIAL

ARK. R. CRIM. P. 36.22 (1989) (motions must be filed prior to the time fixed to file a notice of appeal, 30 day limit under ARK. CODE ANN. § 16-91-105); ARK. CODE ANN. § 16-89-130 (1987) (new trial may be granted based upon discovery of important post-verdict evidence, within 30 day limit for filing notice of appeal); *Vasquez v. State*, 287 Ark. 468, 473, 701 S.W.2d 357, 360

(1985) (court considers due diligence; the "probable effect of the testimony" at a new trial; relief is not granted where evidence is merely cumulative or attacks the credibility of a trial witness)

POST-CONVICTION REMEDIES

ARK. R. CRIM. P. 37.2(c) (petition must be filed within 60 days from the date mandate issued by the appellate court or within 90 days from entry of judgment upon a plea of guilty); *Dumond v. State*, 294 Ark. 379, 385, 743 S.W.2d 779, 782 (1988) (per curiam) (a claim of newly discovered evidence is not a cognizable ground for a petition seeking post-conviction relief under ARK. R. CRIM. P. 37.1); *Penn v. State*, 282 Ark. 571, 670 S.W.2d 426, 428 (1984) (writ of error coram nobis based on newly discovered evidence is available for case between trial and appeal where another confesses to the crime, if: (1) there existed some fact which would have prevented the rendering of the judgment had it been known at trial; (2) the evidence was not considered at trial through no negligence or fault of defendant; (3) due diligence and a valid excuse for delay in bringing the petition; (4) full disclosure of specific facts relied upon supporting constitutional violation; and (5) a rebuttable presumption attaches that the judgment of conviction is valid)

CLEMENCY, ETC.

ARK. CONST. art. V, § 11; *id.* art. VI, § 18; ARK. CODE ANN. §§ 5-4-607, 16-93-204 (Supp. 1991);

Sanders v. State, 291 Ark. 200, 723 S.W.2d 370, 372 (1987) (clemency is the exclusive avenue to consider a claim of actual innocence when other post-conviction relief is untimely or unavailable)

CALIFORNIA

MOTION FOR NEW TRIAL

CAL. PENAL CODE § 1181(8) (motion for new trial based on newly discovered evidence; evidence must be material and could not have been discovered with reasonable diligence at trial); *id.* §§ 1182, 1191 (within 20 judicial days after the verdict, before entry of judgment, 10 day extension may be granted to consider motion for new trial); *People v. Delgado*, 5 Cal.4th 312, 19 Cal.Rptr.2d 529, 851 P.2d 811, 820 (1993) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence, and not merely its materiality, must be newly discovered; (2) not merely cumulative; (3) would "render a different result probable on a retrial"; (4) due diligence; and (5) established "by the best evidence of which the case admits")

POST-CONVICTION REMEDIES

CAL. PENAL CODE § 1473 *et seq* (habeas corpus); *id.* § 1502 (no time limit); *People v. Gonzalez*, 51 Cal.3d 1179, 1246, 275 Cal.Rptr 729, 800 P.2d 1159 (1990) (post-conviction petition based on

newly discovered evidence of innocence may be brought at any time and must "cast[] fundamental doubt on the accuracy and reliability of the proceedings"; "At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability" and at the penalty phase must "so clearly change[] the balance of aggravation against mitigation that its omission 'more likely than not' altered the outcome"), *cert. denied*, 112 S.Ct. 117 (1991)

CLEMENCY, ETC.

CAL. CONST. art. V, § 8; CAL. GOVT. CODE § 12030(a)

COLORADO

MOTION FOR NEW TRIAL

COLO. R. CRIM. P. 33(b), 7B COLO. REV. STAT. (1993 Supp.) (motion for new trial based on newly discovered evidence must be "filed as soon after entry of judgment as the facts supporting it become known to the defendant"; motion for new trial based on any other grounds must be filed within 15 days or within such time as the court may fix during the 15 day period); *People v. Jones*, 690 P.2d 866, 869 (Colo. Ct. App. 1984) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence discovered since trial and defendant and

his counsel exercised diligence; (2) evidence is material and not merely cumulative or impeaching; and (3) "would probably produce an acquittal" on retrial)

POST-CONVICTION REMEDIES

COLO. R. CRIM. P. 35(c)(2)(V), 7B COLO. REV. STAT. (1984) (standard for post-conviction relief based on newly discovered evidence: (1) evidence is material; (2) due diligence; and (3) "requires vacation of the conviction or sentence in the interest of justice"); COLO. REV. STAT. ANN. § 16-5-402(1), 8A COLO. REV. STAT. (1986) (time limit for post-conviction challenges on the validity of a judgment: no time limit for class 1 felonies; 3 year limit for all other felonies; 18 months for misdemeanors; 6 months for petty offenses); COLO. REV. STAT. ANN. § 16-5-402(2)(d) (exception to time limits in § 16-5-402(1) includes "justifiable excuse or excusable neglect")

CLEMENCY, ETC.

COLO. CONST. art. IV, § 7; COLO. REV. STAT. §§ 16-17-101, 16-17-102 (1986)

CONNECTICUT

MOTION FOR NEW TRIAL

CONN. GEN. STAT. ANN. § 52-270(a)(West 1991) (motion for new trial based on the discovery of

new evidence); *see also* CONN. PRACTICE BOOK § 904 (same); CONN. GEN. STAT. ANN. § 52-582 (West 1991) (3 year limit); *Taborsky v. State*, 142 Conn. 619, 116 A.2d 433, 435 (1955) (standard concerns "whether it is probable that on a new trial a different result would be reached"); *Reilly v. State*, 32 Conn. Supp. 349, 355 A.2d 324, 329 (Conn. Super. Ct. 1976) (burden on defendant to show: (1) evidence "in fact newly discovered"; (2) material; (3) due diligence; (4) not merely cumulative; and (5) "likely to produce a different result in a new trial"); *Andersen v. State*, 43 Conn. 514, 517 (1876) (in capital case, the interests of "justice and humanity" require the court "to pause and consider" before applying newly discovered evidence standard in all its rigor); *Hamlin v. State*, 48 Conn. 92, 94 (1880) (capital defendant is entitled to "the benefit of a doubt that might be raised" by the newly discovered evidence)

POST-CONVICTION REMDIES

CONN. GEN. STAT. ANN. § 52-466 (West 1991) (no time limit); *Summerville v. Warden*, 229 Conn. 397, 431 (1994) (standard for granting new trial based on newly discovered evidence in a habeas proceeding is "more demanding than a probability of a different result" standard for a motion for new trial); *see also id.* at 439-40 (noting possible standards)

CLEMENCY, ETC.

CONN. CONST. art. IV, § 13; CONN. GEN. STAT. ANN. § 18-26 (1988)

DELAWARE

MOTION FOR NEW TRIAL

DEL. SUPERIOR COURT R. CRIM. P. 33 (1987) (2 year limit, but if an appeal is pending, motion may be granted only on remand of the case); *Lloyd v. State*, 534 A.2d 1262, 1267 (Del. 1987) (standard for granting new trial based on newly discovered evidence: (1) "would have probably changed the result if presented to the jury"; (2) newly discovered and exercise of due diligence; and (3) not merely cumulative or impeaching); *Blankenship v. State*, 447 A.2d 428, 434 (Del. 1982) (standard for granting new trial based on recanted evidence: (1) court "is reasonably well satisfied that testimony given by material witness is false"; (2) without it, jury might have reached a different verdict; and (3) party seeking new trial was surprised by testimony and was unable to meet it or did not know of its falsity until after the trial)

POST-CONVICTION REMEDIES

DEL. SUPERIOR COURT R. CRIM. P. 61(a)(1) (availability of review for claims of newly discovered evidence pertaining solely to the issue of guilt

or innocence is not resolved, but rule provides that post-conviction review is limited "to set aside a judgment of conviction on the ground that . . . there is a sufficient factual and legal basis for a collateral attack upon a criminal conviction"); *id.* 48(a) (permitting prosecutor to apply for a post-trial entry of nolle prosequi)

CLEMENCY, ETC.

DEL. CONST. art. VII, § 1

DISTRICT OF COLUMBIA

MOTION FOR NEW TRIAL

D.C. SUPERIOR CT. CRIM. R. 33 (1992) (2 year limit); *Wright v. United States*, 387 A.2d 582, 587 (D.C. 1978) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence discovered since trial; (2) due diligence; (3) not merely cumulative or impeaching; (4) evidence is material; and (5) "would probably produce an acquittal" upon new trial)

POST-CONVICTION REMEDIES

D.C. CODE § 23-110 (1993) (remedies on motion attacking sentence); *id.* § 23-110(b) (no time limit); *see also Swain v. Pressley*, 430 U.S. 372 (1977) (upholding federal statute expressly precluding federal habeas corpus review of criminal judgments from the Superior Court of the

CLEMENCY, ETC.

CONN. CONST. art. IV, § 13; CONN. GEN. STAT. ANN. § 18-26 (1988)

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POST-CONVICTION REMEDIES

D.C. CODE § 23-110 (1993) (remedies on motion attacking sentence); *id.* § 23-110(b) (no time limit); *see also Swain v. Pressley*, 430 U.S. 372 (1977) (upholding federal statute expressly precluding federal habeas corpus review of criminal judgments from the Superior Court of the

District of Columbia, except under very narrow circumstances)

CLEMENCY, ETC.

U.S. CONST. art. II, § 2, cl. 1 (power of President to grant pardons); 28 C.F.R., pt. 1 (pardon procedures)

FLORIDA

MOTION FOR NEW TRIAL

FLA. R. CRIM. P. 3.590(a) (1994) (10 day limit); *id.* 3.600(a)(3) (1994) ("New and material evidence, which, if introduced at the trial would probably have changed the verdict or finding of the court, and which the defendant could not with reasonable diligence have discovered and produced at the trial, has been discovered."); *Sevier v. State*, 596 So.2d 771, 772 (Fla. Dist. Ct. App. 2d Dist. 1992) (standard on newly discovered evidence is that the evidence must be of such a nature that it would probably produce an acquittal on retrial, *not* that the evidence would have "conclusively" produced a different verdict)

POST-CONVICTION REMEDIES

FLA. R. CRIM. P. 3.800 (1994) (corrections of an illegal sentence may be raised at any time; not

applicable to capital cases, minimum mandatory sentence or no sentencing discretion circumstances); *id.* 3.850(b) (motion to vacate sentence that exceeds the limits provided by law may be filed at any time; 2 year limit on all other motions, unless they are based on newly discovered facts); *id.* 3.851(b)(1) (motion to vacate sentence of death shall be filed within 1 year after judgment and sentence of death become final); *Jones v. State*, 591 So.2d 911 (Fla. 1991) (per curiam) (relief for newly discovered evidence claim under 3.850 or "new" 3.851 contingent on: (1) due diligence; and (2) "newly discovered evidence must be of such a nature that it would *probably* produce an acquittal on retrial") (emphasis in original)

CLEMENCY, ETC.

FLA. CONST. art. IV, § 8 (1968); FLA. STAT. § 940./01 (Supp. 1993); RULES OF EXECUTIVE CLEMENCY OF FLORIDA 17; *see also* FLA. STAT. 922 (1993) (statutes regulating executions)

GEORGIA

MOTION FOR NEW TRIAL

GA. CODE ANN. § 5-5-23 (1990) (motion for new trial may be granted based on newly discovered evidence when evidence is: (1) material; (2) not

merely cumulative or impeaching; (3) discovered since trial; and (4) when motion filed within time allowed for filing motion for new trial); *id.* § 5-5-40(a) (1982) (motion for new trial, except in extraordinary cases, shall be filed within 30 days); *id.* § 5-5-40(f) (1982) (motions for new trial in death penalty cases given priority); *Young v. State*, 194 Ga. App. 335, 390 S.E.2d 305, 305-306 (1990) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence discovered since trial; (2) due diligence; (3) "so material that it would probably produce a different verdict"; (4) not merely cumulative; (5) affidavit of witness attached, or its absence accounted for; and (6) does not operate solely to impeach)

POST-CONVICTION REMEDIES

GA. CODE ANN. § 5-5-41(a) (1982) (extraordinary motion for new trial may be filed after expiration of 30 day limit for filing motion for new trial upon showing of good reason for delay); *id.* § 5-5-41(b) (1982) (once a motion for a new trial is filed within 30 day limit and overruled, or after expiration of 30 day limit, only extraordinary motions for a new trial will be allowed; only one extraordinary motion allowed per verdict or judgment); *Dick v. State*, 248 Ga. 898, 287 S.E.2d 11, 13-14 (1982) (standard for granting extraordinary motion for new trial based on newly discovered evidence: (1) evidence discovered

since trial; (2) due diligence; (3) evidence is "so material that it would probably produce a different verdict"; (4) not merely cumulative; (5) not merely impeaching; and (6) witness affidavit attached or its absence accounted for); GA. CODE ANN. § 9-14-40 *et seq.* (habeas corpus provisions); *id.* (no time limit); *Bush v. Chappell*, 225 Ga. 659, 171 S.E.2d 128, 130 (1969) (remedy for newly discovered evidence is by extraordinary motion for new trial, not by habeas corpus)

CLEMENCY, ETC.

GA. CONST. art. IV, § II, ¶ II; GA. CODE ANN. §§ 42-9-20, 42-9-42 (1991)

HAWAII

MOTION FOR NEW TRIAL

HAW. REV. STAT. § 635-56 (1985) (court may grant new trial for any legal cause); HAW. R. PENAL P. 33 (1992) (10 day limit); *State v. Caraballo*, 62 HAW. 309, 615 P.2d 91, 97 (1980) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence discovered since trial; (2) due diligence; (3) evidence is material and not merely cumulative or impeaching; and (4) "would probably change the result of a later trial")

POST-CONVICTION REMEDIES

HAW. R. PENAL P. 40 (post-conviction proceedings); *id.* (no time limit); *State v. Allen*, 7 Haw. App. 89, 744 P.2d 789, 792 (1987) ("allegations of petition must show that if taken as true the facts alleged would change the verdict")

CLEMENCY, ETC.

HAW. REV. STAT. § 353-72 (1993)

IDAHO

MOTION FOR NEW TRIAL

IDAHO CODE § 19-2406(7) (1987) (motion for new trial may be granted based on newly discovered evidence); IDAHO CRIM. R. 34 (2 year limit); *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972, 978 (1976) (standard for granting new trial based on newly discovered evidence: (1) evidence newly discovered and unknown to defendant during trial; (2) material and not merely cumulative or impeaching; (3) "will probably produce an acquittal"; and (4) no lack of diligence); *see also id.* 551 P.2d at 979 (new trial granted if evidence is "such as to render a different verdict reasonably probable upon a retrial")

POST-CONVICTION REMEDIES

IDAHO CODE § 19-4901(a)(4) (1987) (relief granted upon showing that newly discovered evidence of material facts exists "that requires vacation of

the conviction or sentence in the interest of justice"); *id.* § 19-4901(b) (issues that could have been raised on direct appeal but were not are forfeited, unless it appears to the court, upon substantial factual showing, "that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt" and could not have been presented with exercise of due diligence); *id.* § 19-4902 (1 year limit); *id.* § 19-2719(3) (capital defendant must file any legal or factual challenges within 42 days of judgment, and before death warrant is filed); *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972, 978 (1976) (same standard as motion for new trial based on newly discovered evidence)

CLEMENCY, ETC.

IDAHO CONST. art. IV, § 7; Idaho Code §§ 20-240 (Supp. 1992), 67-804 (1989)

ILLINOIS

MOTION FOR NEW TRIAL

725 ILL. COMP. STAT. 5/116-1 (30 day limit); *People v. Molstad*, 101 Ill.2d 128, 134, 461 N.E.2d 398, 401-02 (1984) (standard for granting a new trial based on newly discovered evidence: (1) "must be of such conclusive character that it will probably change the result on retrial"; (2) material; (3) not merely cumulative; (4) evidence discovered since trial; and (5) due diligence)

POST-CONVICTION REMEDIES

725 ILL. COMP. STAT. 5/122-1 (time limits applying to post-conviction requests containing a claim of newly discovered evidence: (1) 6 month limit from denial of a petition for leave to appeal or the date for filing such a petition if none is filed or issuance of the opinion from the Illinois Supreme Court; or (2) 6 month limit from date of the order denying certiorari by the United States Supreme Court or the date for filing such a petition if none is filed; or (3) 3 year limit from date of conviction; whichever is later unless the petitioner alleges facts showing that delay was not due to his culpable negligence); 735 ILL. COMP. STAT. 5/2-1401 (2 year limit for petitions for relief from judgment); *People v. Sanchez*, 131 Ill.2d 417, 546 N.E.2d 574, 576 (1989) (one purpose of a petition for relief from judgment is to "bring before the court facts which had they been known at the trial would have prevented the entry of the contested judgment")

CLEMENCY, ETC.

ILL. CONST. art. V, § 12; 730 ILL. COMP. STAT. 5/3-3-13 (1991)

INDIANA

MOTION FOR NEW TRIAL

IND. RULE PC 2 (provisions for belated motion to correct error and belated appeal); IND. R. CRIM. P. 16(A) (motion to correct error necessary when party seeks to address newly discovered material evidence capable of production within 30

days of final judgment); *id.* 16(B) (1992) (30 day limit for filing motion to correct error); IND. TRIAL R. 59(A)(1) (motion to correct error is a prerequisite for appeal when party seeks to address newly discovered material evidence capable of production within 30 days of judgment); *id.* 59(C) (30 day limit for filing motion to correct error); *Fox v. State*, 568 N.E.2d 1006, 1007 (Ind. 1991) (standard for granting motion to correct error based on newly discovered evidence: (1) evidence discovered since trial; (2) material and relevant; (3) not cumulative; (4) not merely impeaching; (5) not privileged or incompetent; (6) due diligence; (7) worthy of credit; (8) can be produced upon retrial; and (9) will probably produce a different result)

POST-CONVICTION REMEDIES

IND. RULE PC 1, § 1(a)(4) (relief available for persons claiming newly discovered evidence of material facts); *id.* (no time limit); *Torrence v. State*, 263 Ind. 202, 328 N.E.2D 214, 216-17 (1975) (standard for granting relief based on newly discovered evidence under IND. RULE PC 1, § 1(a)(4) is the same standard applied when granting a motion to correct error based on newly discovered evidence: (1) evidence discovered since trial; (2) material and relevant; (3) not cumulative; (4) not merely impeaching; (5) not privileged or incompetent; (6) due diligence; (7) orthy of credit; (8) can be produced upon retrial; and (9) will probably produce a different result)

CLEMENCY, ETC.

IND. CONST. art. V, § 17; IND. CODE §§ 11-9-2-1 to 11-9-2-4, 35-38-6-8 (1988)

IOWA

MOTION FOR NEW TRIAL

IOWA R. CRIM. P. 23.2 (1993) (45 day limit from date of conviction or 5 days prior to sentencing, whichever is earlier); *id.* 23.2(b)(8) (new trial may be granted based on newly discovered important and material evidence, 2 year limit, absent good cause); *Origer v. State*, 495 N.W.2d 132, 139 (Iowa Ct. App. 1992) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence discovered since verdict; (2) due diligence; (3) material, not merely cumulative or impeaching; and (4) would probably change the result)

POST-CONVICTION REMEDIES

IOWA CODE § 822.3 (1993) (3 year limit, waiver available if there is a claim of law or fact that could not have been raised within the statutory time); *State v. Edman*, 444 N.W.2d 103, 106 (Iowa Ct. App. 1989) (court must "be satisfied that a true injustice has been perpetrated" when granting a new trial based on newly discovered evidence after expiration of the 3 year limit); *State v. Bear*, 417 N.W.2d 467, 471-72 (Iowa Ct. App. 1987) (standard for granting motion for new trial or post-conviction relief based on newly

discovered evidence: (1) due diligence; (2) material, not merely cumulative or impeaching; and (3) would probably change the result)

CLEMENCY, ETC.

IOWA CONST. art. IV, § 16; IOWA CODE §§ 914.1 to 914.6

KANSAS

MOTION FOR NEW TRIAL

KAN. STAT. ANN. § 22-3501(1) (1988) (2 year limit for motion for new trial based on newly discovered evidence; 10 day limit if based on any other grounds); *State v. Hobson*, 697 P.2d 1274, 1275-76 (1985) (standard for granting motion for new trial based on newly discovered evidence: (1) "evidence is of such materiality that it would be likely to produce a different result upon retrial"; (2) due diligence; and (3) not merely impeaching) (internal citation omitted)

POST-CONVICTION REMEDIES

KAN. CIV. PRO. CODE ANN. § 60-1507 (contains no explicit provision for newly discovered evidence); *id.* § 60-1507(a) (no time limit); *see State v. Bradley*, 246 Kan. 316, 319, 787 P.2d 706 (1990) (same standard applies for post-conviction

granting of a new trial based on newly discovered evidence as applies to motions for new trial based on newly discovered evidence)

CLEMENCY, ETC.

KAN. CRIM. PRO ANN. § 22-3701

KENTUCKY

MOTION FOR NEW TRIAL

KY. R. CRIM. P. 10.02(1) (new trial may be granted for any cause which prevented fair trial, or is required in interest of justice); *id.* 10.02(2) (court may order new trial on its own initiative within 10 days of verdict for any reason it might have granted a new trial on motion of defendant); *id.* 10.06(1) (1983) (motion must be made within 5 days of return of verdict, or within 1 year of judgment if based on newly discovered evidence, or at a later time if the court for good cause permits); *Wheeler v. Commonwealth*, 395 S.W.2d 569, 571, 572 (Ky. 1965) (standard for granting motion for new trial based on newly discovered evidence: (1) due diligence; and (2) evidence "must be of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted")

POST-CONVICTION REMEDIES

KY. R. CRIM. P. 11.42(1) (motion to vacate, set aside or correct sentence based on claim of right to be released on ground that sentence is subject

to collateral attack); *id.* (no time limit); KY. R. CIV. P. 60.02(b) (motion for relief of final judgment based on newly discovered evidence that could not have been discovered in time to move for a new trial may be filed within 1 year); *Gross v. Commonwealth*, 648 S.W.2d 853, 856-57 (Ky. 1983) (relief under KY. R. CIV. P. 60.02 is discretionary and as a threshold issue, motion must be made within reasonable time); *id.* at 857 (language of KY. R. CRIM. P. 11.42 forecloses the defendant from raising any questions under KY. R. CIV. P. 60.02 which are issues that could reasonably have been presented by R. 11.42 proceedings); KY. STAT. ANN. § 419.020 *et seq.* (provisions for habeas corpus); *id.* § 419.020 (no time limit)

CLEMENCY, ETC.

KY. CONST. § 77

LOUISIANA

MOTION FOR NEW TRIAL

LA. CODE CRIM. PROC. art. 853 (West 1994) (1 year limit if based on newly discovered evidence, but if an appeal is pending, motion may be granted only on remand); *id.* (if based on any other grounds, motion must be filed before sentencing; sentencing may be postponed for good cause); *id.* art. 851(3) (statutory standard for motion for new trial based on newly discovered evidence); *State v. Prudholm*, 446 So.2d 729, 735 (La. 1984) (standard for granting motion for new trial based on newly discovered evidence: (1)

evidence discovered since trial; (2) due diligence; (3) material to issues at trial; and (4) "must be of such a nature that it would probably produce an acquittal" upon retrial); *id.* at 736 (noting "except in rare circumstances, a motion for a new trial should not be granted on the basis of a recantation since that disclaimer is tantamount to admission of perjury so as to discredit the witness at later trial"); *State v. Cobb*, 419 So.2d 1237, 1245 (La. 1982) (defendant bears burden of proving "an injustice was done or that the trial court abused its discretion" in denying the motion)

POST-CONVICTION REMEDIES

La. Code Crim. Proc. art. 924 *et seq.* (West 1994) (provisions for post-conviction relief; contains no explicit provision for claims of newly discovered evidence); *id.* art. 930.8 (3 year limit, unless defendant has received death sentence or a stated exception applies); *id.* art. 930.3 (enumerating grounds upon which post-conviction application may be filed, including that the conviction was obtained in violation of the defendant's state or federal constitutional rights)

CLEMENCY, ETC.

La. Const. art. IV, § 5(E) (1974); La. Rev. Stat. Ann. § 15:572 (West 1992)

MAINE

MOTION FOR NEW TRIAL

Me. R. Crim. P. 33 (1992) (2 year limit if based on newly discovered evidence; 10 day limit if based on any other grounds); *State v. Rich*, 592 A.2d 1085, 1087 (Me. 1991) (standard for granting motion for new trial based on newly discovered evidence: (1) new evidence "will probably change the result" upon retrial; (2) evidence discovered since trial; (3) due diligence; (4) material; and (5) "not merely cumulative or impeaching, unless it is clear that such impeachment would have resulted in a different verdict")

POST-CONVICTION REMEDIES

Me. Rev. Stat. Ann. tit. 15, § 2121 *et seq.* (West 1980) (no time limit); *id.* (no express provision for newly discovered evidence)

CLEMENCY, ETC.

Me. Const. art. V, part. 1, § 11

MARYLAND

MOTION FOR NEW TRIAL

Md. R. Crim. P. 4-331(a) (10 day limit); Md. R. Crim. P. 4-331(c) (1992) (1 year limit when motion is based on newly discovered evidence that could not have been discovered within the general 10 day limit); *Love v. State*, 95 Md.App. 420, 430-33, 621 A.2d 910, 915-917 (Md. Ct. Spec. App.) (standard for granting motion for new

trial based on newly discovered evidence: (1) evidence is newly discovered which could not have been discovered with due diligence; (2) material; (3) not merely cumulative or impeaching; and (4) there is "a substantial or significant possibility that the verdict of the trier of fact would have been affected by the absence of the evidence, to wit, that the newly discovered evidence may well have produced a different result"), *cert. denied*, 331 Md. 480, 628 A.2d 1067 (1993); *see also Yorke v. State*, 315 Md. 578, 588, 556 A.2d 230 (1989)

POST-CONVICTION REMEDIES

MD. CODE ANN. art. 27, § 645A (post-conviction procedure "to set aside or correct the sentence"; no explicit provision for newly discovered evidence); *id.* § 645A(a)(2) (2 petition limit); *id.* § 645A(a)(3)(i) (240 day limit for first petition in capital case); *id.* § 645A(a)(3)(ii) (extension available upon showing of good cause)

CLEMENCY, ETC.

MD. CONST. art. II, § 20; MD. CODE ANN. art. 27, § 77 (1992 Repl. Vol.); *id.* art. 41, § 4-513, *et seq.* (1993 Repl. Vol.)

MASSACHUSETTS

MOTION FOR NEW TRIAL

MASS. R. CRIM. P. 30(b) (1979) (provision for granting motion for new trial "at any time if it appears that justice may not have been done"; if appeal is pending when motion is filed, leave to

proceed must be granted by appellate court; if it is a capital (or first degree murder) case, leave to proceed must be granted by state supreme court, which has exclusive jurisdiction over capital cases; appeals are stayed if leave to proceed is granted); *Commonwealth v. Grace*, 397 Mass. 303, 491 N.E.2d 246, 248 (1986) (standard for granting new trial based on newly discovered evidence: (1) evidence discovered since trial "casts a real doubt on the justice of the conviction"; (2) evidence is material, credible, and carries "a measure of strength in support of the defendant's position"; (3) "there is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial"; and (4) due diligence)

POST-CONVICTION REMEDIES

Leaster v. Commonwealth, 385 Mass. 547, 432 N.E.2d 708, 709 (1982) (MASS. R. CRIM. P. 30 "was adopted in 1979 as the exclusive vehicle for post-conviction relief"); MASS. R. CRIM. P. 30(a) (no time limit for filing application for post-conviction relief based on claim of illegal or illegally imposed sentence, but newly discovered evidence not considered; new trial motion may be filed at any time under MASS. R. CRIM. P. 30(b)); *id.* 29 (60 day limit for filing motion to revise or revoke sentence when it appears that justice may not have been done); *but see Commonwealth v. Amirault*, 415 Mass. 112, 612 N.E.2d 631, 633 (1993) (judge cannot consider events taking place after sentencing when considering Rule 29 motions)

CLEMENCY, ETC.

MASS. CONST. pt. 2, ch. 2, § 1, art. 8; MASS. GEN. L. ch. 127, §§ 152, 154 (Petitions for clemency are first considered by the Advisory Board of Pardons, which makes recommendations to the Governor; after considering the advice and consent of the Governor's Council, Governor may grant executive clemency)

MICHIGAN

MOTION FOR NEW TRIAL

MICH. CT. R. 6.431(A)(1992) ([1] 42 day limit from date of judgment, which is same period for filing an appeal by right; [2] if claim of appeal is filed, 28 days from date of commencement of time for filing defendant-appellant's brief; [3] if defendant fails to file a timely claim of appeal, he may file a motion for new trial within the time for filing an application for leave to appeal – 18 months from date of judgment); *id.* 6.431(B) (court may grant motion for new trial "on any ground that would support appellate reversal of the conviction" or if the "verdict has resulted in a miscarriage of justice"); *Michigan v. Barbara*, 400 Mich. 352, 255 N.W.2d 171, 174 (1977) (standard for granting motion for new trial based on newly discovered evidence: (1) "evidence itself, not merely its materiality, was newly-discovered"; (2) not cumulative; (3) will "render a different result probable on a retrial"; and (4) due diligence); *id.* (recantation testimony "traditionally regarded as suspect and untrustworthy"); *id.* (where new evidence is only impeaching, it is deemed merely cumulative)

POST-CONVICTION REMEDIES

MICH. CT. R. 6.500 *et seq.* (provisions for post-conviction relief); MICH. CT. R. 6.508(D)(3) (grounds for relief cannot be repetitive of claims that could have been raised in previous motions or on appeal, unless defendant demonstrates good cause and actual prejudice, or if the court finds "there is a significant possibility that defendant is innocent of the crime")

CLEMENCY, ETC.

MICH. CONST. art. V, § 14; MICH. COMP. LAWS §§ 791.243 (MICH. STAT. ANN. § 28.2313); MICH. COMP. LAWS § 791.244 (MICH. STAT. ANN. § 28.2314)

MINNESOTA

MOTION FOR NEW TRIAL

MINN. R. CRIM. P. 26.04, Subd. 1(1), ¶ 5 (provision for granting new trial based on newly discovered material evidence that could not have been found and produced at the trial with reasonable diligence); *id.* 26.04, Subd. 1(3) (1992) (15 day limit); *State v. Caldwell*, 322 N.W.2d 574, 588 (Minn. 1982) (standard for granting motion for new trial based on newly discovered evidence: (1) due diligence; (2) evidence was not within petitioner's or his counsel's knowledge at the time of trial; (3) not merely impeaching, cumulative or doubtful; (4) "would probably produce a result different from or more favorable than that which actually occurred"; and (5) material)

POST-CONVICTION REMEDIES

MINN. STAT. § 590.01 *et seq.* (1992) (contains no time limit or explicit provision for newly discovered evidence); *Berry v. State*, 364 N.W.2d 795, 796 (Minn. 1985) (standard for granting new trial on basis of newly discovered evidence: Petitioner has burden to show by a fair preponderance of the evidence: (1) due diligence; (2) evidence was not known to defense at time of trial; (3) evidence is "not impeaching, cumulative, or doubtful"; and (4) it "would probably produce a result different from or more favorable than that which actually occurred")

CLEMENCY, ETC.

MINN. CONST. art. V, § 7; MINN. STAT. § 638.01 *et seq.* (1992)

MISSISSIPPI

MOTION FOR NEW TRIAL

MISS. CODE ANN. § 99-17-47 (1993) (provisions for motion for new trial, limit of 2 trials shall be granted to the same party in any cause); MISS. UNIFORM CRIM. R. CIR. CT. P. 5.16(3) (1992) (requirements for granting motion for new trial based on newly discovered evidence: (1) new and material evidence; (2) would probably produce a different result; and (3) due diligence); *id.* (motion for new trial based on newly discovered evidence must be made before adjournment of the term of court in which defendant was convicted); *Gaston v. State*, 562 So.2d 61, 63 (Miss. 1990) (standard for granting motion for new

trial based on newly discovered evidence – court must be satisfied that: (1) evidence discovered since trial; (2) due diligence; and (3) "would probably produce a different result" upon retrial)

POST-CONVICTION REMEDIES

MISS. CODE ANN. § 99-39-5(1)(e) (Supp. 1990) (relief granted when there exists newly discovered evidence that requires vacation of conviction or sentence in the interest of justice); *id.* § 99-39-5(2) (3 year limit, exception for those cases in which petitioner can show existence of newly discovered evidence of such a nature that it "would be practically conclusive" that if introduced at trial, it would have "caused a different result in the conviction or sentence")

CLEMENCY, ETC.

MISS. CONST. art. V, § 124; MISS. CODE ANN. § 47-5-115 (1981)

MISSOURI

MOTION FOR NEW TRIAL

MO. R. CRIM. P. 29.11(b) (1992) (15 day limit for a motion for new trial based on newly discovered evidence; 10 day extension available); *State v. Johns*, 679 S.W.2d 253, 266 (Mo. banc 1984) (standard for granting new trial based on newly discovered evidence: (1) evidence discovered since trial; (2) due diligence; (3) "evidence is so material that it would probably produce a different result on a new trial"; and (4) not cumulative or

merely impeaching), *cert. denied*, 470 U.S. 1034 (1985)

POST-CONVICTION REMEDIES

Mo. R. Crim. P. 29.15(b) (motion for post-conviction relief limited to vacating, setting aside, or correcting judgment and must be filed within 30 days of appellate judgment if appeal was taken; within 90 days of defendant's deliverance to department of corrections if no appeal was sought); *Wilson v. State*, 813 S.W.2d 833, 834 (Mo. banc 1991) (claim of newly discovered evidence may not be raised in post-conviction relief motion); *State v. McKinney*, 475 S.W.2d 51, 54 (Mo. 1971) (claim of newly discovered evidence cannot be raised on direct appeal)

CLEMENCY, ETC.

Mo. Const. art. IV, § 7; Mo. Rev. Stat. §§ 217.220 (Vernon Supp. 1992), 552.070 (Vernon 1987) *Whitaker v. State*, 451 S.W.2d 11, 15 (Mo. 1970) (newly discovered evidence concerning innocence is cognizable in a clemency proceeding)

MONTANA

MOTION FOR NEW TRIAL

Mont. Code Ann. § 46-16-702(2) (1991) (30 day limit); *State v. Redcrow*, 242 Mont. 254, 790 P.2d 449, 452-53 (1990) (application for new trial must show: (1) evidence discovered since trial; (2) due diligence; (3) "so material that it would probably produce a different result upon another trial"; (4) not cumulative; (5) supported

by affidavit of witness whose evidence is newly discovered; and (6) not merely impeaching); *State v. Perry*, 232 Mont. 455, 758 P.2d 268, 275 (1988) (new trial based on recanted testimony will be granted only when the judge is "satisfied the recantation of the witness is true")

POST-CONVICTION REMEDIES

Mont. Code Ann. § 46-21-101 *et seq.* (petition to vacate, set aside, or correct sentence; contains no explicit provision for newly discovered evidence); *id.* § 46-21-105(2) (newly discovered evidence could be raised in an original or amended petition if the grounds for relief could not have reasonably been raised on direct appeal); *id.* § 46-21-105(1) (if petitioner can show newly discovered evidence could not reasonably have been raised in the original or amended petition, it may be raised in a subsequent petition); *id.* § 46-21-102 (5 year limit); *but see State v. Perry*, 232 Mont. 455, 758 P.2d 268, 272-73 (1988) (5 year statute of limitations was not meant to "deprive defendants held in violation of their constitutional rights of a method of redress regardless of [their] diligence or the justness of [their] claim"; post-conviction request for relief based on newly discovered evidence was therefore reviewable); *id.* at 273 (standard for granting a new trial based on newly discovered evidence that another person committed the crime: defendant "must demonstrate that he has been the victim of an unjust conviction which has resulted in his unlawful detention")

CLEMENCY, ETC.

MONT. CONST. art. VI, § 12; MONT. CODE ANN. §§ 46-23-301 to 46-23-316 (1991)

NEBRASKA

MOTION FOR NEW TRIAL

NEB. REV. STAT. § 29-2101 (Reissue 1989) (motion for new trial based on newly discovered evidence may be granted if: (1) evidence is material; and (2) due diligence); *State v. Atkinson*, 191 Neb. 9, 213 N.W.2d 351, 352 (1973) (motion for new trial will be granted upon timely application when based on newly discovered evidence that is material, provided the defendant's substantial rights are affected and he could not produce the evidence at trial with exercise of reasonable diligence); NEB. REV. STAT. § 29-2103 (Reissue 1989) (3 year limit if based on newly discovered evidence; 10 day limit if motion is based on anything except newly discovered evidence); *Smith v. State*, 167 Neb. 492, 93 N.W.2d 499, 500 (1958) (same)

POST-CONVICTION REMEDIES

State v. Dabney, 183 Neb. 316, 160 N.W.2d 163, 164 (1968) (post-conviction claim based on newly discovered evidence is not permitted)

CLEMENCY, ETC.

NEB. CONST. art. IV § 13; NEB. REV. STAT. §§ 83-1, 130 (Board of Pardons may grant or deny relief); *see also Otey v. State*, 240 Neb. 813, 485 N.W.2d 153, 166 (1992)

NEVADA

MOTION FOR NEW TRIAL

NEV. REV. STAT. ANN. §§ 176.515(1), (3) (2 year limit when motion is based on newly discovered evidence); *id.* § 176.515(4) (7 day limit for any other grounds); *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279 (1991) (standard for granting new trial based on newly discovered evidence: (1) newly discovered; (2) material; (3) due diligence; (4) non-cumulative; (5) would "render a different result probable upon retrial"; (6) not merely impeaching "unless the witness is so important that a different result would be reasonably probable"; and (7) evidence is "the best evidence the case admits")

POST-CONVICTION REMEDIES

NEV. REV. STAT. ANN. § 177.315 *et seq.* (concerning state habeas petitions); *id.* § 34.725 *et seq.* (same); *Snow v. State*, 105 Nev. 521, 523, 779 P.2d 96 (1989) (standard for granting new trial in a capital case, after two year limit for motion for new trial based on newly discovered evidence, "new evidence tending to prove . . . conviction was illegally obtained" may be considered on state habeas review)

CLEMENCY, ETC.

NEV. CONST. art. V, § 14; NEV. REV. STAT. § 213.080 (1991)

NEW HAMPSHIRE

MOTION FOR NEW TRIAL

N.H. Rev. Stat. Ann. § 526:1 (1983) (provisions for granting motion for new trial); *id.* § 526:4 (1974) (3 year limit); *State v. Cote*, 129 N.H. 358, 530 A.2d 775, 781-82 (1987) (standard for granting new trial based on newly discovered evidence: (1) moving party was not at fault for not discovering the evidence at trial; (2) evidence is admissable, material, and not cumulative; and (3) different result will probably be reached upon retrial)

POST-CONVICTION REMEDIES

N.H. Rev. Stat. Ann § 543:1 *et seq.* (habeas corpus provisions); *id.* § 534:3 (no time limit); *State v. Killam*, 137 N.H. 155, 626 A.2d 401, 404 (1993) (standard for granting new trial based on newly discovered evidence: (1) moving party was not at fault for not discovering the evidence at trial; (2) evidence is admissable, material to the merits, and not cumulative; and (3) "different result will probably be reached" upon retrial)

CLEMENCY, ETC.

N.H. Const. pt. 2, art. 52; N.H. Rev. Stat. Ann. § 4:23 (1988)

NEW JERSEY

MOTION FOR NEW TRIAL

N.J. Ct. R. 3:20-2 (motion for new trial based on newly discovered evidence "may be made at any time," but if an appeal is pending, motion may be granted only on remand; 10 day limit for any other ground); *State v. Carter*, 85 N.J. 300, 314, 426 A.2d 501, 508 (1981) (defendant must demonstrate that the new evidence is: (1) material and not merely cumulative or impeaching or contradictory; (2) discovered since trial and exercise of due diligence; and (3) "of the sort that would probably change the jury's verdict if new trial were granted"); *State v. Smith*, 29 N.J. 561, 573, 150 A.2d 769, 775 (on third element, must show that there is a probability not merely possibility that the jury's verdict would change if new trial were granted), *cert. denied*, 361 U.S. 861 (1959)

POST-CONVICTION REMEDIES

N.J. Ct. R. 3:22-12 (no time limit for filing petition for post-conviction relief to correct illegal sentence; 5 year limit for all other petitions, unless defendant alleges facts showing that the delay was due to excusable neglect); *see also State v. Mitchell*, 126 N.J. 565, 575, 601 A.2d 198, 203 (1992); N.J. Ct. R. 3:22-2 (post-conviction relief may be granted, *inter alia*, for an illegal sentence; or for any habeas corpus, common-law, or statutory grounds for a collateral attack); *id.* 3:22-4(b) ("fundamental injustice" exception to general bar to consider grounds not raised in prior proceedings); *see also State v. Preciose*, 129 N.J. 451, 476, 609 A.2d 1280, 1293 (1992) (fundamental injustice exception applies to guilt or

innocence); *id.* 129 N.J. at 459, 609 A.2d at 1284 (defendant must establish the right to relief under N.J. Ct. R. 3:22-2 by a preponderance of the credible evidence); *see also Mitchell*, 126 N.J. at 579, 601 A.2d at 205 ("specific facts must be alleged and articulated, which, if believed, would provide the court with an adequate basis on which to rest its decision")

CLEMENCY, ETC.

N.J. Const. art. V, § 2, ¶ 1; N.J. Stat. Ann. §§ 2A:167-4, 2A:167-12 (West 1985)

NEW MEXICO

MOTION FOR NEW TRIAL

N.M. R. Crim. P. 5-614(C) (1992) (2 year limit for motion for new trial based on newly discovered evidence, but if an appeal is pending, motion may be granted only on remand of the case; 10 day limit on any other grounds); *State v. Volpato*, 102 N.M. 383, 696 P.2d 471, 472 (1985) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence "will probably change the result" upon retrial; (2) discovered since trial; (3) due diligence; (4) material; (5) not merely cumulative; and (6) not merely impeaching or contradictory)

POST-CONVICTION REMEDIES.

N.M. R. Crim. P. 5-802 (1992) (procedures for habeas petitions; no explicit provision for newly discovered evidence and no time limit for filing motion for relief); *see generally State v. Peppers*,

110 N.M. 393, 796 P.2d 614, 616-17 (N.M. Ct. App. 1990) (discussing post-conviction procedures)

CLEMENCY, ETC.

N.M. Const. art. V, § 6; N.M. Stat. Ann. § 31-21-17 (1990)

NEW YORK

MOTION FOR NEW TRIAL

N.Y. Crim. Proc. Law § 330.30 (requirements for granting motion to set aside verdict based on newly discovered evidence: (1) evidence is newly discovered; (2) due diligence; and (3) creates probability that had such evidence been received at trial the verdict would have been more favorable to defendant); *id.* (motion must be filed after verdict of guilty and before sentencing)

POST-CONVICTION REMEDIES

N.Y. Crim. Proc. Law § 440.10(g) (motion to vacate judgment may be granted on grounds of newly discovered evidence when: (1) evidence discovered since trial; (2) due diligence; (3) "create[s] a probability that had such evidence been received at trial the verdict would have been more favorable to defendant"; and (4) motion must be made with due diligence after discovery of new evidence); *id.* § 440.10(1) (no time limit); N.Y. Civ. Prac. Laws and Rules § 7003 (writ of habeas corpus); *id.* (no time limit)

CLEMENCY, ETC.

N.Y. CONST. art. IV, § 4

NORTH CAROLINA

MOTION FOR NEW TRIAL

N.C. GEN. STAT. § 15A-1414 (10 day limit to file "motion for appropriate relief"); *State v. Beaver*, 291 N.C. 137, 229 S.E.2d 179, 183 (1976) (standard for granting new trial based on newly discovered evidence: (1) newly discovered evidence; (2) newly discovered evidence is probably true; (3) material, competent, and relevant; (4) due diligence; (5) not merely cumulative or corroborative; (6) does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) "different result will probably be reached at a new trial"); *see also State v. Britt*, 320 N.C. 705, 360 S.E.2d 660 (1987) (test for granting new trial based on recanted evidence: (1) court reasonably well satisfied that the testimony given by a material witness was false; and (2) reasonable possibility that, had the false testimony not been admitted, a different result would have occurred)

POST-CONVICTION REMEDIES

N.C. GEN. STAT. § 15A-1415(b)(6) (post-conviction relief based on newly discovered evidence may be sought after 10 day limit under § 15A-1414); *State v. Person*, 298 N.C. 765, 259 S.E.2d 867, 870 (1979) (applying same 7 factors under *State v. Beaver* after enactment of N.C. GEN. STAT. § 15A-1415(b)(6))

CLEMENCY, ETC.

N.C. CONST. art. III, § 5(6); N.C. GEN. STAT. §§ 147-23 to 147-25 (1987)

NORTH DAKOTA

MOTION FOR NEW TRIAL

N.D. R. CRIM. P. 33(b) (1992-1993) (Motion for new trial based on newly discovered evidence must be filed within 30 days from time new evidence is discovered *and* 2 years from final judgment); *State v. VanNatta*, 506 N.W.2d 63, 70 (N.D. 1993) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence discovered since trial; (2) due diligence; (3) evidence is material; and (4) "the weight and quality of the newly discovered evidence would likely result in an acquittal")

POST-CONVICTION REMEDIES

N.D. CENT. CODE § 29-32.1-01(e) (1991) (post-conviction relief may be sought when newly discovered evidence exists, requiring vacation of the conviction or sentence in the interest of justice); *id.* § 29-32.1-03(2) (no time limit); *State v. Schlickenmayer*, 364 N.W.2d 108, 111 (N.D. 1985) (standard for granting post-conviction relief based on newly discovered evidence is the same standard applied for granting motion for new trial based on newly discovered evidence: (1) evidence discovered since trial; (2) due diligence; (3) evidence is material; and (4) will probably produce an acquittal); N.D. CENT. CODE

§ 32-22-01 *et seq.* (provisions for writ of habeas corpus)

CLEMENCY, ETC.

N.D. CONST. art. V, § 6

OHIO

MOTION FOR NEW TRIAL

OHIO R. CRIM. P. 33(A)(6) (1993) (motion for new trial may be granted when new material evidence is discovered that with reasonable diligence could not have been produced at trial); OHIO R. CRIM. P. 33(B), ¶ 2 (1988) (when motion is based upon newly discovered evidence, 120 day limit from judgment or 7 days from court finding that defendant was unavoidably prevented from discovering the evidence within the 120 day limit); *id.* 33(B), ¶ 1 (1988) (for all other grounds, 14 day limit or 7 days from court finding that defendant was unavoidably prevented from filing within the 14 day limit); *see also State v. Pinkerman*, 88 Ohio App.3d 158, 623 N.E.2d 643 (Lawrence County 1993) (construing "unavoidably prevented from filing" time limit rule); *State v. Walden*, 19 Ohio App.3d 141, 483 N.E.2d 859, 866 (Franklin County 1984) ("a party is unavoidably prevented from filing a motion for new trial if the party had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time

prescribed for filing the motion for new trial in the exercise of reasonable diligence")

POST-CONVICTION REMEDIES

OHIO REV. CODE ANN. § 2953.21 (Page's 1993) (petition to vacate or set aside sentence; contains no time limit or explicit provision for newly discovered evidence); *id.* § 2953.23(A) (Page's 1993) (for good cause shown, court may entertain a second petition or successive petitions for similar relief based upon the same facts or newly discovered evidence); *State v. Walden*, 19 Ohio App.3d 141, 483 N.E.2d 859, 866 (Franlin County 1984) (motion pursuant to OHIO REV. CODE ANN. § 2953.21 "must be predicated upon denial or infringement of constitutional rights so substantial as to render the judgment void or voidable")

CLEMENCY, ETC.

OHIO CONST. art. III, § 11 (Baldwin 1984); OHIO REV. CODE ANN. §§ 2967.01 to 2967.12 (Page's 1993)

OKLAHOMA

MOTION FOR NEW TRIAL

OKLA. STAT. ANN. tit. 22, § 952, ¶ 7 (West 1986) (provisions for granting new trial based on newly discovered evidence); OKLA. CT. R. AND P. § 952 (same); *id.* § 953 (motion must be made within 3 months of discovering new evidence but not later than 1 year after judgment); *Salyers v. State*, 755 P.2d 97, 101 (Okla. Crim. App. 1988)

(standard for granting motion for new trial based on newly discovered evidence: (1) evidence is material; (2) due diligence; (3) not cumulative; and (4) evidence "create[s] a reasonable probability that, had the newly discovered evidence been introduced at trial, it would have changed the outcome")

POST-CONVICTION REMEDIES

OKLA. STAT. ANN. tit. 22, § 1080 *et seq.* (contains no time limits, except in respect to prisoners sentenced to death); *id.* § 1089(C) (application for post-conviction relief when defendant is sentenced to death must be filed within 90 days after denial of certiorari by the U.S. Supreme Court or the expiration of time allowed to file petition for certiorari); *id.* § 1080(d) (grounds for relief may include newly discovered evidence of material facts); *see Brecheen v. State*, 835 P.2d 117, 121 (Okla. Crim. App. 1992) (suggesting that the standard for granting post-conviction relief based on newly discovered evidence is similar to the standard for granting motion for new trial based on newly discovered evidence), *cert. denied*, 113 S.Ct. 1063 (1993)

CLEMENCY, ETC.

OKLA. CONST. art. VI, § 10; OKLA. STAT., tit. 21, § 701.11a (Supp. 1990)

OREGON

MOTION FOR NEW TRIAL

OR. REV. STAT. § 136.535(1) (1991) (5 day limit, may be waived); OR. R. CIV. P. 64(B)(4) (motion for new trial may be granted based upon newly discovered evidence when original proceeding was a trial by jury); *State v. Adams*, 91 Or.App. 24, 29, 754 P.2d 1, 3 & n.4, 4 (1988) (standard for granting new trial based on newly discovered evidence; defendant must show: (1) evidence discovered since trial; (2) will " probably change the result of the trial"; and (3) not merely impeaching or contradictory)

POST-CONVICTION REMEDIES

OR. REV. STAT. § 138.530 (newly discovered evidence is not one of the statutorily listed bases for granting post-conviction relief, which must be based on constitutional infringement); *id.* § 138.510(2) (2 year limit for post-conviction relief)

CLEMENCY, ETC.

OR. CONST. art. V, § 14; OR. REV. STAT. §§ 144.640, 144.650 (1991)

PENNSYLVANIA

MOTION FOR NEW TRIAL

PA. R. CRIM. P. 1123(d) (motion for new trial based on newly discovered evidence must be raised "promptly" after discovering evidence; if appeal is pending, court may grant motion only

upon remand of the case); *id.* 1123(a) (motion for new trial based on grounds which were previously raised in trial or pre-trial motions must be filed within 10 days – may include other grounds, upon cause showing); *Commonwealth v. Brosnick*, 530 Pa. 158, 607 A.2d 725, 727 (1992) (standard for granting new trial based on newly discovered evidence: (1) evidence discovered since trial, exercise of due diligence; (2) not merely corroborative nor cumulative; (3) not merely impeaching credibility of a witness; (4) "a different verdict will likely result"; and (5) evidence must be producible and admissible); *see also Commonwealth v. Frey*, 512 Pa. 557, 517 A.2d 1265, 1267 n.4 (1986) (same), *cert. denied*, 481 U.S. 1007 (1987)

POST-CONVICTION REMEDIES

42 PA. CONS. STAT. ANN. § 9541 *et seq.* (1982) (Post-Conviction Hearing Act); *id.* § 9543(3)(xiii) (grounds for relief based on newly discovered exculpatory evidence "that would have affected the outcome of the trial if it had been introduced"); *id.* § 9545 (no time limit; only one petition for each crime allowed); PA. R. CRIM. P. 1123(f) (if petitioner is granted the right to file post-verdict motions as though timely filed, under the Post-Conviction Hearing Act, such motions must be filed within 10 days of the order granting the right, waiver available); *Commonwealth v. Frey*, 512 Pa. 557, 517 A.2d 1265, 1267 n.4 (1986) (standard for claims of newly discovered evidence made under § 9543(3)(xiii) are less restrictive than those made on direct appeal [i.e., second and third requirements of *Brosnick* test do not apply]), *cert. denied*, 481 U.S. 1007 (1987); *see also* PA. R. CRIM. P. 1500 *et seq.* (procedures for implementing the Post-Conviction Hearing Act); 42 PA. CONS. STAT. ANN. § 6503(b) (writ of habeas corpus is not available if a remedy may be had by post-conviction hearing proceedings)

CLEMENCY, ETC.

PA. CONST. art. IV, § 9

RHODE ISLAND

MOTION FOR NEW TRIAL

R.I. SUPERIOR CT. R. CRIM. P. 33 (1991-1992) (2 year limit for motion for new trial based on newly discovered evidence; 10 day limit for any other grounds); *State v. Morejon*, 603 A.2d 730, 737 (R.I. 1992) (standard for granting motion for new trial based on newly discovered evidence is a two part test: (1) threshold inquiry must meet 4 factors: (a) discovered since trial; (b) due diligence; (c) not merely cumulative or impeaching, but material to the issue: (d) "would probably change the verdict" at retrial; and (2) evidence must be credible enough to warrant a new trial)

POST-CONVICTION REMEDIES

R.I. GEN. LAWS § 10-9.1-1(a)(4) (1981) (relief based on newly discovered evidence of material facts requiring vacation of the conviction or sentence in the interest of justice); *id.* § 10-9.1-3 (no time limit); *Fontaine v. State*, 602 A.2d 521, 524 (R.I. 1992) ("standard for granting post-conviction relief [based on newly discovered evidence]

is the same standard for" motion for a new trial based on newly discovered evidence); *State v. Berberian*, 118 R.I. 413, 374 A.2d 778, 780 (1977) (doctrine of res judicata is inapplicable to state habeas corpus proceedings)

CLEMENCY, ETC.

R.I. CONST. art. IX, §§ 4, 13

SOUTH CAROLINA

MOTION FOR NEW TRIAL

S.C. R. CRIM. P. 29(b) (Supp. 1991) (motion must be made within reasonable time after discovery of new evidence); *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737, 738-39 (1979) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence "would probably change the result" upon retrial; (2) evidence discovered since trial; (3) due diligence; (4) material to the issue of guilt or innocence; and (5) not merely cumulative or impeaching), *cert. denied*, 444 U.S. 1012 (1980)

POST-CONVICTION REMEDIES

S.C. CODE ANN. § 17-27-20(a)(4) (grounds for relief include newly discovered evidence); *Hayden v. State*, 278 S.C. 610, 299 S.E.2d 854, 855 (1983) (standard for granting post-conviction relief based on newly discovered evidence is the same standard applied for granting motion for new trial based on newly discovered evidence: (1) evidence "would probably change the result" upon retrial; (2) evidence discovered since trial; (3) due diligence; (4) material to the issue of

guilt or innocence; and (5) not merely cumulative nor impeaching); *McElrath v. State*, 276 S.C. 282, 277 S.E.2d 890 (1981) (laches may bar any claim for collateral relief in the absence of some explanation or justification for delay; reasonable diligence in processing claims for relief is required); *Brazell v. State*, 287 S.C. 253, 294 S.E.2d 343, 343 (1982) (per curiam) (state must show prejudice in order to claim doctrine of laches as a bar)

CLEMENCY, ETC.

S.C. CONST. art. IV, § 14; S.C. CODE ANN. §§ 24-21-910 to 24-21-1000 (1977 and Supp. 1991)

SOUTH DAKOTA

MOTION FOR NEW TRIAL

S.D. CODIFIED LAWS ANN. § 15-6-59(a) (motion for new trial in civil cases may be granted on grounds of newly discovered evidence that is material and which could not have been discovered with due diligence and produced at trial); *id.* § 23A-29-1 (motion for new trial in criminal case may be granted under the same conditions specified and in the same manner as provided by § 15-6-59(b)); *id.* (10 day limit)

POST-CONVICTION REMEDIES

S.D. CODIFIED LAWS ANN. § 21-27-1 *et seq.* (provision for writ of habeas corpus); *id.* § 21-27-3.2 (provisions for dismissing application for new trial based on newly discovered evidence due to prejudice against prosecution resulting from

delay in filing application – prejudice is rebuttably presumed if application is filed more than 5 years after judgment)

CLEMENCY, ETC.

S.D. CONST. art. IV, § 3; S.D. CODIFIED LAWS §§ 23A-27A-20 to 23A-27A-21, 24-14-1 (1988)

TENNESSEE

MOTION FOR NEW TRIAL

TENN. R. CRIM. P. 33(b) (30 day limit for filing motion for new trial); TENN. CODE ANN. § 40-26-105 (relief under writ of error coram nobis based on newly discovered evidence is only available upon a showing of due diligence and "if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial"); *id.* § 27-7-103 (1 year limit for filing petition for writ of error coram nobis); *Teague v. State*, 772 S.W.2d 915, 920 (Tenn. Crim. App. 1988) (as a practical matter, only difference between relief under TENN. R. CRIM. P. 33(b) and § 40-26-105 based on newly discovered evidence is the time for filing), *cert. denied*, 493 U.S. 874 (1989); *id.* at 921-22 (standard for granting new trial based on newly discovered evidence under TENN. R. CRIM. P. 33(b) or § 40-26-105: (1) discovered since trial; (2) may have resulted in different judgment if presented at trial; (3) petitioner "was without fault in failing to present" evidence at appropriate time; (4) affidavit relevant and material; (5) not simply cumulative; and (6) not merely impeaching)

POST-CONVICTION REMEDIES

TENN. CODE ANN. § 40-30-101 *et seq.* (Supp. 1988) (post-conviction remedies, including those based on newly discovered evidence, are cognizable only when raising a state or federal constitutional issue which was not either previously determined or waived); *id.* § 40-30-102 (3 year limit); *id.* § 40-30-112(b)(2) (rebuttable presumption that a ground for relief not raised in any prior proceeding is waived); *see also Teague v. State*, 772 S.W.2d 915, 923 (Tenn. Crim. App. 1988) (discussing post-conviction proceedings)

CLEMENCY, ETC.

TENN. CONST. art III, § 6; TENN. CODE ANN. §§ 40-27-101 to 40-27-103 (1990)

TEXAS

MOTION FOR NEW TRIAL

TEX. R. APP. P. 31(a)(1) (1992) (30 day limit); TEX. R. APP. P. 30(b)(6) (new trial granted "where new evidence favorable to the accused has been discovered since trial"); *Moore v. State*, No. 71,337, slip op. at 14-15, 1994 Tex. Crim. App. LEXIS 28 (Tex. Crim. App. Mar. 9, 1994) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence discovered since trial; (2) due diligence; (3) evidence "would probably bring about a different result in another trial"; and (4) evidence is admissable and is not merely cumulative, corroborative, collateral, or impeaching)

POST-CONVICTION REMEDIES

TEX. CODE CRIM. PROC. ANN. art. 11.07 (state writ of habeas corpus); *State of Texas ex rel. Holmes v. Court of Appeals for the Third Dist.*, No. 71,764, slip op. at 16-17, 1994 Tex. Crim. App. LEXIS 52 (Tex. Crim. App. Apr. 20, 1994) (en banc) (state writ of habeas corpus available for claims of actual innocence based on newly discovered evidence if petitioner can demonstrate that the evidence "creates a doubt as to the efficacy of the verdict sufficient to undermine confidence in the verdict and that it is probable that the verdict would be different"; "applicant must show that based on the newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could find proof of guilt beyond a reasonable doubt")

CLEMENCY, ETC.

TEX. CONST. art. IV, § 11; TEX. CODE CRIM. PROC. ANN. § 48.01 (Vernon 1979)

UTAH

MOTION FOR NEW TRIAL

UTAH R. CRIM. P. 24(a) (1994) (new trial may be granted "in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party"); *id.* 24(c) (10 day limit, "or within such further time as the court may fix during the 10-day period"); *State v. James*, 819 P.2d 781, 793 (Utah 1991) (standard for granting motion for new trial based on newly discovered evidence: (1) due

diligence; (2) not merely cumulative; and (3) would "render a different result probable" upon retrial)

POST-CONVICTION REMEDIES

UTAH R. CIV. P. 65B(b)(1) (petition for extraordinary relief, permitting relief from confinement where "the commitment resulted from a substantial denial of rights"); UTAH CODE ANN. § 78-12-31.1 (1992) (expressly providing time limit of 3 months, but provision was held unconstitutional on state law grounds in *Currier v. Holden*, 862 P.2d 1357, 1372 (Utah Ct. App.), *cert. denied*, 870 P.2d 957 (Utah 1993); no new time limit has been implemented); *id.* § 78-12-31.2 (no post-conviction remedies may be applied for or entertained by any court within 30 days prior to the date set for execution of a capital sentence, unless they are based on facts or circumstances developed or first became known within that period); *Stewart v. State By and Through Deland*, 830 P.2d 306, 309 (Utah Ct. App. 1992) (standard for granting post-conviction relief: must be a "substantial likelihood that had certain evidence been available at the time of trial, a different verdict would have resulted"); *Ward v. Turner*, 12 Utah 2d 310, 366 P.2d 72, 74 (1961) (to grant relief under the petition, "the evidence of [petitioner's] innocence must be stronger than would be necessary in the first instance in support of a motion for a new trial"), *cert. denied*, 371 U.S. 872 (1962)

CLEMENCY, ETC.

UTAH CONST. art. VII, § 12; UTAH CODE ANN. §§ 77-27-5 to 77-27-5.5 (Supp. 1993); *id.* § 77-27-5.5(6) (to commute a death sentence, Parole Board may not consider legal or constitutional issues that were or could have been raised in the courts, nor commutation requests based on "new information" which are subject to judicial review); *Foote v. Utah Board of Pardons*, 808 P.2d 734, 735 (Utah 1991) (state habeas is available for review of Board of Pardons' decisions); *Combs v. Turner*, 25 Utah 2d 397, 483 P.2d 437, 441 (1971) (board has exclusive right to commute punishments and grant pardons after conviction); UTAH CONST. art. VII, § 12(3)(a) (Governor may only "grant respites or reprieves" which "may not extend beyond the next session of the board")

VERMONT

MOTION FOR NEW TRIAL

VT. R. CRIM. P. 33 (1983) (2 year limit); *State v. Richards*, 144 Vt. 16, 470 A.2d 1187, 1190 (1983) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence "will probably change the result" upon retrial; (2) evidence discovered since trial; (3) due diligence; (4) evidence is material; and (5) not merely cumulative or impeaching)

POST-CONVICTION REMEDIES

VT. STAT. ANN. tit. 13, § 7131 (no time limit for filing claims of constitutional or statutory violations of U.S. or Vermont law)

CLEMENCY, ETC.

VT. CONST. ch. II, § 20

VIRGINIA

MOTION FOR NEW TRIAL

VA. SUP. CT. R. 1:1 & 3A:15(b) (1992) (21 day limit); *Odum v. Commonwealth*, 225 Va. 123, 130, 301 S.E.2d 145, 149 (1983) (applicant holds burden to show: (1) evidence discovered subsequent to trial; (2) due diligence; (3) "not merely cumulative, corroborative or collateral"; (4) material; and (5) newly discovered evidence "should produce opposite results on the merits at another trial")

POST-CONVICTION REMEDIES

Va. Dep't of Corrections v. Crowley, 227 Va. 254, 263, 316 S.E.2d 439, 443 (1994) (claims of newly discovered evidence pertaining solely to the issue of guilt or innocence are not cognizable on habeas corpus which tests the legality of the incarceration); *see also Coleman v. Thompson*, Record No. 920302 (Va. 1992) ("allegations of 'newly discovered' evidence are not cognizable in habeas corpus"); *cf.* VA. CODE ANN. § 8.01-654(B)(2) (On successive petitions, "[n]o [habeas corpus] writ shall be granted on the

basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.")

CLEMENCY, ETC.

VA. CONST. art. V, § 12; VA. CODE ANN. §§ 53.1-230, 53.1-232 (1991)

WASHINGTON

MOTION FOR NEW TRIAL

WASH. R. CRIM. P. 7.6(a)(3) (motion for new trial based on newly discovered material evidence); *id.* 7.6(b) (10 day limit, which may be extended in the court's discretion); *State v. Williams*, 96 Wash.2d 215, 222-23, 634 P.2d 868, 873 (1981) (standard for granting a new trial based on newly discovered evidence: (1) "will probably change the result of the trial"; (2) discovered since trial; (3) due diligence; (4) material; and (5) not merely cumulative or impeaching); *see also State v. Swan*, 114 Wash.2d 613, 641-42, 790 P.2d 610 (1990) (same), *cert. denied*, 498 U.S. 1046 (1991)

POST-CONVICTION REMEDIES

WASH. R. CRIM. P. 7.8(b)(2) (motion for relief from judgment or order may be based upon newly discovered evidence which could not have been discovered within the 10 day limit for a motion for a new trial under WASH. R. CRIM. P. 7.6); *id.* 7.8(b) (must be filed within a "reasonable time," not to exceed one year); WASH. R. APP. P. 16.4(c)(3) (personal restraint petition filed with

appellate court [the Washington Supreme Court in capital cases] concerning "[m]aterial facts . . . which have not been previously presented and heard, which in the interest of justice require vacation of the conviction [or] sentence"); *In re Jeffries*, 114 Wash.2d 485, 493, 789 P.2d 731, 737 (1990) (capital case personal restraint petition applying *Williams* standard); WASH. REV. CODE ANN. § 10.73.090(1) (1 year limit on all petitions or motions for collateral attack); *id.* § 10.73.100(1) (time limit in § 10.73.090 does not apply to a petition based solely on newly discovered evidence "if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion"); WASH. REV. CODE § 7.36 (state habeas corpus similar to personal restraint petition; 1 year limit); *Toliver v. Olsen*, 109 Wash.2d 607, 612-13, 746 P.2d 809, 812 (1987) (noting "Supreme Court, Court of Appeals and superior court have concurrent original jurisdiction of habeas corpus proceedings seeking post-conviction relief"; allowing superior court to transfer habeas petition to appellate courts to treat as a personal restraint petition)

CLEMENCY, ETC.

WASH. CONST. art. III, § 9; WASH. REV. CODE § 10.01.120 (1992)

WEST VIRGINIA

MOTION FOR NEW TRIAL

W. VA. R. CRIM. P. 33 (no time limit); *State v. Catlett*, 180 W. Va. 447, 376 S.E.2d 834, 838 (1988)

(standard for granting new trial based on newly discovered evidence: (1) evidence appears to have been discovered since trial; (2) due diligence; (3) evidence is material and not merely cumulative; (4) evidence "ought to produce an opposite result" upon retrial; and (5) motion will be denied when "sole object of the new evidence is to discredit or impeach a witness on the opposite side")

POST-CONVICTION REMEDIES

W. VA. CODE § 53-4A-1 *et seq.* (1981) (contains no time limit nor an explicit provision for newly discovered evidence)

CLEMENCY, ETC.

W. VA. CONST. art. VII, § 11

WISCONSIN

MOTION FOR NEW TRIAL

WIS. STAT. § 809.30(2)(b) (1989-1990) (20 day limit); *State v. Boyce*, 75 Wis.2d 452, 457, 249 N.W.2d 758, 760-761 (1977) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence is newly discovered; (2) moving party must not have been negligent in seeking to discover evidence; (3) evidence is material; (4) not merely cumulative; and (5) "reasonably probable that a different result would be reached on a new trial")

POST-CONVICTION REMEDIES

WIS. STAT. ANN. § 974.06 (contains no express provisions for newly discovered evidence); *id.* § 974.06(2) (no time limit); *Vara v. State*, 56 Wis.2d 390, 392, 202 N.W.2d 10, 11 (1972) (post-conviction petition under § 974.06 "is restricted to jurisdictional and constitutional issues"); *but see State v. Bembenek*, 140 Wis.2d 248, 409 N.W.2d 432, 434 (Ct. App. 1987) (request for a new trial on grounds of newly discovered evidence can be raised under § 974.06 as due process may require granting a new trial on the basis of newly discovered evidence after the time for bringing a post-conviction motion has passed; however, petitioner, "at a minimum," has burden to meet the five *Boyce* elements by clear and convincing evidence); *see also State v. Coogan*, 154 Wis.2d 387, 453 N.W.2d 186, 188 (Ct. App. 1990) (same)

CLEMENCY, ETC.

WIS. CONST. art. V, § 6; WIS. STAT. ANN. §§ 304.08 to 304.11

WYOMING

MOTION FOR NEW TRIAL

WYO. STAT. § 7-12-301(c) (1987) (2 year limit); WYO. R. CRIM. P. 33(c) (1992) (same); *Cutbirth v. State*, 751 P.2d 1257, 1259-60 (Wyo. 1988) (standard for granting motion for new trial based on newly discovered evidence: (1) discovered since trial; (2) due diligence; (3) "so material that it

would probably produce a different verdict" upon retrial; and (4) not cumulative)

POST-CONVICTION REMEDIES

WYO STAT. § 7-14-101 *et seq.* (provisions for post-conviction relief); *id.* § 7-14-103(d) (5 year limit); *id.* § 7-14-103(b)(i) (permits petition based on newly discovered evidence to relieve inmate of what would otherwise be a procedural bar against constitutional claims which were not raised on appeal); *see also Cutbirth v. State*, 751 P.2d 1257, 1261 (Wyo. 1988) ("Questions which may be raised by a motion for post-conviction relief are limited to those of constitutional magnitude which manifest a miscarriage of justice.")

CLEMENCY, ETC.

WYO. CONST. art. IV, § 5; WYO. STAT. § 7-13-801 (1987)

APPENDIX B

Federal Motion For New Trial Standard Under Fed. R. Civ. P. 33

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period. (as amended Feb. 28. 1966, eff. July 1, 1966; Mar. 9, 1987, eff. Aug. 1, 1987.)*

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* The Notes of Advisory Committee on Rules further provide:

1944 Adoption

This rule enlarges the time limit for motions for new trial on the ground of newly discovered evidence, from 60 days to two years; and for motions for new trial on other grounds from three to five days. Otherwise, it substantially continues existing practice. See Rule II of the Criminal Appeals Rules of 1933, 292 U.S. 661 [18 U.S.C. formerly following § 688]. *Cf.* Rule 59(a) of the Federal Rules of Civil Procedures, 28 U.S.C., Appendix.

1966 Amendment

The amendments to the first two sentences make it clear that a judge has no power to order a new trial on his own motion, that he can act only in response to a motion timely made by a defendant. Problems of

The federal court standard for considering Rule 33 motions is:

> (1) the evidence must have been discovered since the trial; (2) the party seeking the new trial must show diligence in the attempt to procure the newly discovered evidence; (3) the evidence relied on must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and (5) of such nature that in a new trial it would probably produce an acquittal.

United States v. Lafayette, 983 F.2d 1102, 1105 (D.C. Cir. 1993) (citation omitted); *see also United States v. Pena*, 949 F.2d 751, 758 (5th Cir. 1991); *United States v. Swarek*, 677 F.2d 41, 43 (8th Cir. 1982), *cert. denied*, 459 U.S. 1102 (1983).

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double jeopardy arise when the court acts on its own motion. See *United States v. Smith*, 331 U.S. 469 (1947). These amendments do not, of course, change the power which the court has in certain circumstances, prior to verdict or finding of guilty, to declare a mistrial and order a new trial on its own motion. *See e.g., Gori v. United States*, 367 U.S. 364 (1961); *Downum v. United States*, 372 U.S. 734 (1963); *United States v. Tateo*, 377 U.S. 463 (1964). The amendment to the last sentence changes the time in which the motion may be made to 7 days. See the Advisory Committee's Note to Rule 29.

1987 Amendment

The amendment is technical. No substantive change is intended.